ISSN: 2231-4938 *RGNUL Law Review*

R
L
R

RGNUL Law Review

Volume IV

Number I

A Bi-annual Journal of
the RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB

LexisNexis

RGNUL Law Review (RLR)

JANUARY-JUNE 2014

RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB
SIDHUWAL BHADSON ROAD, PATIALA - 147 001
TEL.: 0175 – 2391600, 2391601, 2391602, 2391603,
TELEFAX: 0175 – 2391690, 2391692
E-MAIL: info@rgnul.ac.in WEBSITE: www.rgnul.ac.in

EDITORIAL

Legal education and research in India have undergone a sea change with the advent of liberalization and globalization. In the recent decades number of legislative changes have taken place leading to international legal regime. The law enforcement in the present time is not confined to the obligation of a single nation unless there is meaningful cooperation and support from the international community. Obviously to bring in more efficacy and certainty in the legal systems around the world there is a need for more openness towards uniformity of law and its application. Here, comes the role of the scholars and researchers to Orient there research to open new vision of knowing and understanding the different systems in different countries. This may include the private law, public law and international law. We hope that *RGNUL Law Review* could provide a forum to the committed researchers to take baton forward.

Tanya Mander

LIVE-IN-RELATIONSHIPS IN INDIA : LEGAL MOVES AND JUDICIAL ATTITUDE: SOME OBSERVATIONS

Manju Jamwal*

1.1 Introduction

The institution of marriage appears to have been evolved with a view to discipline sexual relations and ensure legitimacy of children and their intellectual and psychological development in a congenial atmosphere.[1] With advent of industrial revolution and the development of education throwing open the avenues of economic independence to women, human values, especially those pertaining to husband and wife relations, has undergone radical transformation.[2]

The outcome of rapidly changing social morals has been a peculiarly ambivalent situation in the form of non-marital heterosexual relations ("live-in" relations as they commonly called). Such relationships among the urban, educated, upper middle class and elite young people has emerged towards their independence outlook, aimed at keeping them away from the 'shackles' that institutionalized the marriage.[3]

'Live-in' relationship is a *de facto* non-marital heterosexual relations prevailing in West with the different name like: common law marriages, informal marriages or marriage by habit, deemed marriages etc. It is a willful rejection of the institution of marriage, of the stereotypes it engenders, and of the restrictions and inequalities it has come to stand for.[4]

It is a form of inter-personal status legally recognized in some jurisdictions as a marriage even though no legally recognized marriage ceremony is performed or civil marriage contract is entered into or the marriage registered in a civil registry.[5]

1.2 Law and Live-in-Relationships in India:

There exist no law which directly recognizes the 'live-in' relationship; however two legal moves have brought such relationship (i.e. the non-marital heterosexual relations) into sharp focus in India during the last decade. First, in 2008, the Maharashtra Government's attempt to amend Section 125 of the *Criminal Procedure Code* (hereinafter referred as Cr.P.C.) brought this issue to the fore.[6] The amendment

---

* Senior Assistant Professor, Department of Laws, University of Jammu, Jammu Tawi.

1 Sarojini Nayak & Jeevan Nair, *Women's Empowerment in India*, 110 (2005) Pointer Publisher, Jaipur.

2 *Ibid,* at p. 111.

3 Shoma A. Chatterji, *Women in Perspective-Essays on Gender Issues*; 168 (2010) Vistas Publishing.

4 *Ibid.*

5 Bradley, David "Regulation of Unmarried Cohabitation in West-European Jurisdictions – Determinants of Legal Policy", *International Journal of Law, Policy and the Family*, 15(1): 23 (2001).

6 S. 125 Cr.P.C. is available to all neglected wives, or discarded or divorced wives, abandon children and hapless parents belonging to any religion against husband, father or son. No other relation can claim maintenance under this provision.

sought to broaden the definition of the term "wife" in Section 125 Cr.P.C. by including a woman who was living with a man "like his wife" for a reasonably long period.[7] This move followed the recommendations of the Malimath Committee (2003).[8] Second, *the Protection of Women from Domestic Violence Act* (hereinafter referened as PWDVA) 2005, is considered to be the first piece of legislation that, in having covered relations 'in the nature of marriage', provided a legal recognition to relations outside marriage.[9] In the following discussion, an attempt has been made to examine the context and implications of these two legal moves on different forms of non-marital cohabitation.

1.3 Malimath Committee Report

The Malimath Committee, i.e., the Committee on Reforms of Criminal Justice System, set up in November 2000 under the Chairmanship of V.S. Malimath, Former Chief justice of the Karnataka and Kerala High Courts submitted its report in 2003 (Government of India 2003, hereinafter GOI 2003), wherein, it made several recommendations under the head "offences against women"[10] first being to amend Section 125 of the Cr.P.C. which is concerned with maintenance rights of the "neglected wife, children and parents". This Section seeks "to prevent starvation and vagrancy by compelling the person to perform the obligation which he owes in respect of his wife, child, father or mother who are unable to support themselves".[11]

The Committee sought to extend the definition of 'wife' in Section 125 Cr.P.C. by recommending 'to include a woman who was living with the man as his wife for a reasonably long period, *during the subsistence of the first marriage*'.[12] The extended definition of 'wife' is thus clearly set against the backdrop of secondary relationships of already married men and is not directed at taking cognizance of what may be regarded as emergent forms of non-marital cohabitation. Providing an explanation for its recommendation, the report underlines:

> A woman in a second marriage [of a man] is not entitled to claim maintenance as in law a second marriage during the subsistence of the first marriage is not legal and valid. Such a woman though she is *de facto* the wife of the man [,] in law, she is not his wife. Quite often the man marries the second wife suppressing the earlier marriage. In such a situation, the second wife can't claim the benefit of Section 125 Cr.P.C. for no fault of hers. The husband is absolved of his responsibility of maintaining his second wife. This is manifestly unfair and unreasonable. The man should not be allowed to take advantage of his own illegal acts. Law should not be insensitive to the suffering of such women.[13]

---

7 Maharashtra to Legalize 'live-in' Relationships, *Times of India* October 09, 2008.

8 Ministry of Home Affairs, Government of India, Committee on Reforms of Criminal Justice System 189-94 (2003).

9 See, for details; S. 2(g); *Domestic Violence Act*, 2005.

10 *Supra* note 8.

11 *Ibid,* at p. 189.

12 *Ibid.*

13 *Ibid.*

It is quite evident from above that focus was not on 'non-marital' adult heterosexual relationship but between a married man and his second wife; particularly the one who has been cheated into believing that she is marrying an unmarried man. By adding the clause '*during the subsistence of the first marriage*', the report left little room for any speculation regarding the objective of the recommendations.

Following recommendations of the Malimath Committee, Maharashtra Government initiated an aborted attempt in 2008 to amend Section 125 Cr.P.C. which brought the issue of legal status of 'live-in' relations into the public gaze. The move was construed as an attempt to confer legal status on secondary unions of men as well as legalize the 'live-in' relations, in which the young men and women choose to enter 'non-marital' heterosexual relations prior to entering a long-term committed nuptial ties.[14]

1.4 The PWDVA and 'Relations in the Nature of Marriage'

The PWDVA 2005, has been widely hailed as the first legislation to recognize the existence of non-marital adult heterosexual relations.[15] This Act defines an "aggrieved person" who will be covered under this Act as "any woman who is, or has been, in a *domestic relationship* with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent".[16] Further, the Act defines a 'domestic relationship' as 'a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, *or through a relationship in the nature of marriage*, adoption or are family members living together as a joint family'.[17]

This does not imply that the Act deals with all forms of domestic relations in a comprehensive manner. It excludes the domestic relationship between a male employer and a live-in domestic worker. The Act also clearly has no space for adult 'same-sex' relationships. Nevertheless, it can be construed that, unlike the recommendations of the Malimath Committee, the PWDVA, 2005 has implications for a broader terrain of non-marital relations as it does not explicitly limit itself to the secondary relations of men. In having used the idea of "*relations in the nature of marriage*", the Act seems to have widened the scope of legally recognized domestic relationships between men and women. While this provision invited much criticism and controversy, it is important to note that it neither made an invalid marriage as valid nor provided legal recognition to bigamous marriages. But this provision merely seeks to denounce the domestic violence in any quarter, thus, not a judgment call on the morality of the choice to cohabit outside of marriage.[18]

It can, therefore, be argued that it would be sheer mistake to see this Act as conferring some sort of legal status upon non-marital relations. What it undoubtedly

---

14 *Supra* note 7.

15 Karanjawala, Tahira and Shivani Chugh "The Legal Battle Against Domestic Violence in India: Evolution and Analysis", *International Journal of Law, Policy and the Family,* pp. 289-308. (2009).

16 *Protection of Women from Domestic Violence Act,* 2005, S. 2(a).

17 *Ibid,* S. 2(f).

18 Lawyers Collective and ICRW : Staying Alive: Second Monitoring & Evaluation Report on *the Protection of Women from Domestic Violence Act,* 2005; 7(2008).

does, is to acknowledge the existence of such relationships and the right of women in such relations to accord protection to them from the violence.

1.5 Live-in Relationship and Judicial Attitude in India

Live-in relationship in India is often seen as a taboo; however, it is not very uncommon to find people in big metros staying together as husband-wife without any formal marriage. None of the statutes dealing with marriage such as the *Hindu Marriage Act*, 1955, the *Special Marriage Act*, 1954, *Parsi Marriage and Divorce Act*, 1936 and *Christian Marriages and Divorce Act, 1872*[19] recognize "live-in" relationship directly. *Protection of Women from Domestic Violence Act*, 2005 is considered as the first legislation that recognized the right of protection of a person in *"relationship in the nature of marriage"*.[20] However, living together for long has been considered to be presumption of marriage until some facts prove it to be otherwise under Section 114 of *Indian Evidence Act*.[21]

Indian Courts have also made a strong argument in favour of presumption of marriage in cases where a man and woman have been living together for a reasonably long period of time. For instance, Privy Council in 1927 in *A. Dinohamy v. W.L. Blahamy,*[22] laid down the general proposition that; "where a man and woman are proved to have lived together as husband and wife, the law will presume, unless, contrary be clearly proved; that they were living together in consequence of a valid marriage, and not in a state of concubinage."[23]As per this ruling, a "live-in" relationship was to be considered as a valid marriage if the couple lived together and there was no evidence to the contrary.

In 1929, the Privy Council made significant additions to 1927 ruling in *Mohabhat Ali v. Md. Ibrahim Khan,*[24] wherein it held that "the law presumes in favour of marriage and against concubine age when a man and woman have cohabited continuously for number of years."[25] For a 'live-in' couple to be considered validly married, the court wanted evidence of cohabitation for a number of years, without specifying the minimum number of years. In 1952, the Supreme Court in *Gokal Chand v. Parvin Kumari*[26] reiterated the principle laid down in Dinohamy's case but added that though

---

19 See, for details; S. 11, the *Hindu Marriages Act*, 1955; S. 4, *Parsi Marriages and Divorce Act*; 1936; Sections 4-9 *Indian Christian Marriage Act*, 1872.

20 See, for details; Sections 2(a), 12 read with Sections 18, 19, 20, 21 and 2(f); *Domestic Violence Act* 2005; "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

21 See, for details; S. 114, the *Indian Evidence Act*, 1872.

22 AIR 1927 PC 185.

23 *Ibid,* at p. 187.

24 AIR 1929 PC 135.

25 *Ibid,* at p. 138.

26 AIR 1952 SC 231. In this judgment the Supreme Court had refused to recognize a live-in relationship, though the couple had lived together for some years before the pregnant women went away to live alone with her child born out of her live-in relationship with the man. The rebuttal of the presumption in favour of a valid marriage, in this case, came from the child, who said she did not remember her father ever visiting her or her mother.

the presumption for a valid marriage between a "live-in" couple could be drawn from their long cohabitation, it was no guarantee to earn them legitimacy if the evidence of living together was rebuttable and observed that:

> Continuous cohabitation of woman and man as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.[27]

As a sequel, in Badri Prasad's case where a man and a woman lived together for around 50 years, the Supreme Court stated that there would be strong presumption in favour of wedlock. The Court however added that, "the presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon bastardy."[28] Debate on legality of the 'live-in' relationship as well as legitimacy of a child born out of such relationship once again generated in *Madan Mohan Singh & Ors. v. Rajni Kant & Anr.*,[29] The Court while dismissing the appeal in the property dispute held that that there is a presumption of marriage between those who are in 'live-in' relationship for a long time and this cannot be termed as 'walking-in and walking-out' relationship.[30] This attitude of the court could clearly be inferred that it is in favour of treating the long term living relationship as marriage rather than branding it as new concept like 'live-in' relationship. In *Tulsa v. Durghatiya*,[31] the Supreme Court reiterated the rule that there would be a presumption of marriage when there has been long cohabitation.

Hence, there is a long list of judgments which have favoured a presumption of marriage over that of "concubinage" thereby reflecting strong conviction of judiciary to help such hapless women. As such, one can contend that the Indian legal system does not always seek strict evidence regarding the validity of a marriage in the face of other circumstantial evidence which indicates the existence of "a relation in the nature of marriage".

Keeping into consideration the vulnerable position of women who enter into such relationship willingly or unwillingly, the courts have delivered far reaching judgments. For instance, Allahabad High Court held that a major man and woman can stay together without getting married if they want and this is not illegal.[32]

Supreme Court in the case of *Vidyadhari v. Sukhrana Bai*,[33] issued a Succession Certificate to the 'live-in' partner, who was nominated by the deceased.[34] In *Abhijit Bhikaseth Auti v. State of Maharashtra*, the Bombay High Court observed that it is

---

27 *Ibid,* at p. 240.
28 *Badri Prasad v. Dy. Director of Consolidation*, AIR 1978 SC 1557.
29 AIR 2008 SC 324.
30 *Ibid,* at p. 327.
31 2008(4) SCC 520.
32 *Payal Sharma v. Superintendent*, Nari Niketan, Agra, AIR 2001 All. 254.
33 AIR 2008 SC 629.
34 *Ibid,* at p. 632.

not necessary for a woman to strictly establish the marriage, to claim maintenance under Section 125 of Cr.P.C.[35] In, *Koppisetti Subbharao Subramaniam v. State of A.P.*[36] the Supreme Court extended the protection against dowry under Section 498-A of the *Indian Penal Code* so as to "to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband" and resort to cruelty or torture to the women.[37] This case has extended the protection of women from dowry even when they are in a live-in relationship. Whereas, Delhi High Court while dealing with the validity of 'live-in' relationship in *Alok Kumar v. State*[38] observed that:

> There are no strings attached to this relationship, neither this relationship creates any legal bond between the parties. It is a contract of living together which is renewed every day by the parties and can be terminated by either of the parties without consent of the other party and one party can walk out at will at any time."[39] Further, the persons entering into such relationships are debarred from complaining of infidelity or immorality of the other partner.[40]

In *Lata Singh v. State of U.P. & Anr.*,[41] the Apex Court observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of 'adultery'), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or "live with anyone she likes".[42] This is further evident from the Supreme Court's judgment in *S. Khushboo v. Kanniammal & Anr.*,[43] wherein, apart from other prominent issues such as freedom of speech, etc, Judges Deepak Verma J. and B S Chauhan clarified the scope of criminality in consensual adult relationships when they reiterated that:

> While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under Section 497 IPC.[44]

---

35 (2009) Cr LJ 889.

36 AIR 2009 SC 1329.

37 *Ibid,* at p. 1332.

38 (2010) Cr.L.J. 299; wherein, the petition was filed for quashing of First Information Report (FIR) registered against the petitioner. The complainant, out of malice in order to wreck vengeance on the petitioner because petitioner refused to continue 'live-in' relationship with her, had filed the complaint. The court considered that it is a fit case where FIR should be quashed to prevent the misuse of criminal justice system for personal vengeance of a partner of 'live-in' relationship.

39 *Ibid,* at p. 301.

40 *Ibid.*

41 AIR 2006 SC 2522. In that case, the petitioner was a woman who had married a man belonging to another caste. The petitioner's brother had filed a criminal complaint accusing her husband of offences under Sections 366 and 368 IPC, thereby leading to the commencement of trial proceedings. This Court had entertained a writ petition and granted relief by quashing the criminal trial. Furthermore, the Court had noted that 'no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court'.

42 *Ibid,* at p. 2524.

43 AIR 2010 SC 3196.

44 *Ibid,* at p. 3199.

The Supreme Court once again in *Chellamma v. Tillamma*,[45] gave the status of wife to the partner of 'live-in' relationship. Katju J. and Mishra J. stated that, in their opinion, a man and a woman, even without getting married, can live together if they wish to. This may be regarded as immoral by society but is not illegal. There is a difference between law and morality. The bench went one step ahead and observed that the children born to such a parent would be called legitimate. They have the rights in their parent's property.

Unfortunately, the Courts while interpreting the recommendations of Malimath Committee (seeking change in definition of 'Wife' as described in Section 125 of Cr.P.C.) could not appreciate the real intent of such recommendations which were made keeping in view the interests of second woman who was living with man as his wife for a reasonably long period, during the subsistence of the first marriage.

There are instances in which the courts have interpreted only one part of recommendation ignoring the other relevant one. For instance in *Chanmuniya v. Virendra Kumar Singh Kushwaha and Another*,[46] Justices G S Singhvi and A.K. Ganguly cited the first part of the recommendation of the Malimath Committee to support their case for a broad interpretation of the term 'wife'. For them, the above recommendation of Malimath Committee suggested that the "evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption that the marriage was performed according to the customary rites of the parties."

Therefore, for these judges, the Malimath Committee's recommendation that the word "wife" in Section 125 Cr.P.C. should be amended to include a woman who was living with the man like his wife for a reasonably long period. This omits the phrase "*during the subsistence of the first marriage*", which as we saw above, is part of the original recommendation. The judges made no reference to the situation in which a man or a woman enters a second marriage *during the subsistence of the first one.* It is submitted that, if the idea is to protect women in marriages or marriage like relations which render women vulnerable, the ground laid down by the recommendations of the committee needs to be much clearly stated and broadly defined when incorporated in law.

Though, *the Protection of Women from Domestic Violence Act* 2005, is considered to be the first piece of legislation that, in having covered relations "in the nature of marriage", provided legal recognition to relations out- side marriage but the connotation of phrase "in the nature of marriage" is far from obvious and this is already a ground for contestation of the PWDVA. In the case of *Aruna Parmod Shah v. Union of India*,[47] the petitioner challenged the constitutionality of the Act on the grounds that, first, it discriminates against men and second, the definition of

---

45 AIR 2009 SC 112.

46 (2011) 1 SCC 141.

47 WP (Cri.) 425/2008 & Cri. Misc. Application 4171/2008 available at *http://www. indiankanoon.org/ doc/511970/* last visited on 27.4.2013.

"domestic relationship" contained in Section 2(f) of the Act is objectionable. Regarding the second, the petitioner argued that placing "relationships in the nature of marriage" at par with "married" status leads to the derogation of the rights of the legally-wedded wife. The Delhi High Court rejected both these contentions regarding the constitutional status of the Act. With regard to the second contention, which is of concern to us, the court said that "there is no reason why equal treatment should not be accorded to a wife as well as a woman who has been living with a man as his "common law" wife or even as a mistress" . In this case, the Judges interpreted "a relation in the nature of marriage" as covering both a "common law marriage" and a relation with a "mistress" without clarifying the legal and social connotations of these terms.

A certain amount of dissonance in the interpretation of the idea of "*relation in the nature of marriage*" in the PWDVA, 2005 was reflected, in *D. Veluswamy v. D Patchaiammal*,[48] wherein, the Supreme Court has dwelt at length upon the interpretation of this provision (i.e. 'relation in the nature of marriage') of the Act. In a case which concerned a woman seeking maintenance from an apparently already married man under Section 125 Cr.P.C., the judges observed that:

> Unfortunately [the] expression [in the nature of marriage] has not been defined in the Act [PWDVA, 2005]. Since there is no direct decision of this Court on the interpretation of this expression we think it necessary to interpret it because a large number of cases will be coming up before the Courts in our country on this point, and hence an authoritative decision is required.[49]

---

48 AIR 2010 SCW 6731, where in the appellant had alleged that he was married according to the Hindu Customary Rites with one Lakshmi. The respondent D. Patchaiammal filed a petition under S. 125 Cr.P.C. in the year 2001 before the Family Court at Coimbatore in which she alleged that she was married to the appellant on 14.9.1986 and since then the appellant and she lived together in her father's house for two or three years. It is alleged in the petition that after two or three years the appellant left the house of the respondent's father and started living in his native place, but would visit the respondent occasionally. It was alleged that the appellant deserted the respondent. The respondent alleged that she did not have any kind of livelihood and she was unable to maintain herself, whereas appellant is a Secondary Grade Teacher drawing a salary of Rs.10000/- per month. Hence it was prayed that the appellant be directed to pay Rs.500/- per month as maintenance to the respondent. Thus it was the own case of the respondent that the appellant left her in 1988 or 1989 (i.e. two or three years after the alleged marriage in 1986). It is important to note that the respondent had filed the maintenance petition after twelve years of her desertion by the appellant. The lower Family Court had held that the appellant was married to the respondent and not to Lakshmi. These findings have been upheld by the High Court in the impugned judgment. In opinion of the Apex Court, since Lakshmi was not made a party to the proceedings before the Family Court or before the High Court and no notice was issued to her hence any declaration about her marital status vis-à-vis the appellant is wholly null and void as it will be violative of the rules of natural justice. There is also no finding in the judgment of the learned Family Court Judge on the question whether the appellant and respondent had lived together for a reasonably long period of time in a relationship which was in the nature of marriage. The Apex Court opined that such findings were essential to decide the case. Hence, it set aside the impugned judgment of the High Court and Family Court Judge, Coimbatore and remanded the matter to the Family Court Judge to decide the matter afresh in accordance with law.

49 *Ibid,* at p. 6738.

It was further observed that:

> It seems to us that in the aforesaid Act of 2005 Parliament have taken notice of a new social phenomenon which has emerged in our country known as live-in relationship. This new relationship is still rare in our country, and is sometimes found in big urban cities in India, but it is very common in North America and Europe.[50]

After making this statement, which equates "relation in the nature of marriage" with "live-in" relations prevalent in the west, the judges state that in their opinion a "*relationship in the nature of marriage*" is akin to a common law marriage. According to the judgment, common law marriages require that although not being formally married, (a) The couple must hold themselves out to society as being akin to spouses, (b) They must be of legal age to marry, (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried, (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.[51]

The judges also stated that:

> In our opinion not all live-in relationships will amount to a relation- ship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant, it would not, in our opinion, be a relationship in the nature of marriage.[52]

It was further observed that:

> No doubt the view we are taking would exclude many women who have had a live-in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression 'relationship in the nature of marriage' and not 'live-in relationship'.[53]

In saying this, the judges appear to be implying that the scope of the term "live-in relationship" is much broader than that of "relationship in the nature of marriage". Indirectly, however, the judgment also equates what it treats as a "new social phenomena" with the idea of "relationship in the nature of marriage", subject to the definition of common law marriage. Arguably there is much confusion in the various arguments of the judgment which seems to draw upon contradictory meanings of the phrase "live-in" relationship.

It is submitted that this would mean that if a married man deceived a woman into marrying him, and lived with her as if married, this would not be a relationship in the nature of marriage, even though they represent to the world that they are married and live in a stable relationship and have children together. This was not the intention of the Act and it was in some measure intended to protect women like these as the phenomena of a man marrying more than once is well known in this country.

---

50 *Ibid.*
51 *Ibid,* at p. 6740.
52 *Ibid.*
53 *Ibid,* at p. 6741.

It is thus obvious that non-marital relations don't have a 'criminal' or 'illegal' status in India insofar as they do not amount to 'adultery' and insofar as the principle of 'presumption of marriage' prevails. And this is not a new trend. However, this cannot be construed that courts promote such relationships; rather the law traditionally has been biased in favour of marriage. It reserves many rights and privileges to married persons to preserve and encourage the institution of marriage. Such stands, in particular cases of "live-in" relationship, by and large, are based on the assumption that they are not between equals, and therefore women must be protected by the courts in the patriarchal set-up of the society. But, the same is not the case when one of the parties to the marriage is already married. And it is this which can be seen to be a newly recognized thorny issue in the Indian legal domain.

Conclusions:

'Live in' relationships are not new for western countries, where usually unmarried men and women enter non-marital but exclusive relations with each other, often as a form of experimentation prior to a marital commitment. However, in India, such relationships are often seen as a taboo, it is not very uncommon to find people in big metros staying together as husband-wife without any marriage. True, in an ambience where it is difficult to get rid of a bad marriage because of difficult divorce laws, 'living in' for many appear to be an attractive alternative. But is it really as attractive as it appears to be? Does the bold radicalism structured into the relationship stand the test of time? What if one of the live in partner walks out of the relationship? What if one of the 'live in' partners is already married and has children?

In India because of complex marriage laws women generally fell prey to male chauvinism and enter into fraudulent marriages thereby become 'other women' in his life. Such women are not welcomed in our society. In order to help such women, Justice (Retd) S Malimath committee recommended to amend Section 125 Cr.P.C. for changes in the definition of the word 'wife', so that the courts could treat any woman who has lived with a man for a 'reasonable period' as his legitimate wife. Therefore, purpose of recommendations of the Malimath Committee (which have however not been implemented) was to provide some relief to women who have been victim of such relations in which, the male partner is already married and enters a relation with another woman, who may or may not be aware of the marital status of this man.

As a sequel to this development, the *Domestic Violence Act*, 2005 also recognized the economic rights of female "live-in" partners. Thus, these legal moves appear to be set against the backdrop of prevalent practices of married men entering secondary relations with women and are a response to more traditional and even patriarchal forms of non-marital cohabitation. It may also be noted that none of these legislative moves should be treated as dealing comprehensively either with the gamut of "live-in" relations or with the corpus of rights and obligations which might require legal redress in such relations. At best they extend some of the rights of married women to the women who are in non-marital relations with men. Such cases are arguably quite distinct from a western style cohabitation patterns which are referred to as 'live-in' relationships in popular vocabulary.

Hence, keeping inconsideration, the Indian social conditions and cultural ethos, it is obvious that all forms of 'non-marital' relations cannot or should not be treated as legally identical. In any case, even if they should be treated as such, the decision to do so should be preceded by a careful consideration of the implications this will have for the different categories. Since there is no clear legal definition of 'non-marital relations', the field has been left wide open and hence the Apex Court felt an urgent need to separate a 'relation in the nature of marriage' from that with a 'servant' or a 'keep' and a 'one night stand'. This, however, cannot be construed that judiciary promotes such 'live-in' relationships. Law traditionally has been biased in favour of marriage. It reserves many rights and privileges to married persons to preserve and encourage the institution of marriage. Such stands, in particular cases of live-in relationship, it appears that, by and large, is based on the assumption that they are not between equals and therefore women must be protected by the courts in the patriarchal set up of Indian society.

THE CIVIL LIABILITY FOR NUCLEAR DAMAGE : AN ASSESSMENT

Sunayana*
Jagrup Singh Sekhon**

Profits and responsibility should go parallel and it is the underlying logic behind the worldwide nuclear liability regime. Various uncertainties, fears, insecurities and hazards are attached to nuclear power. Due to being clean and cost effective, the nuclear energy happens to be a promising source of energy that can tackle energy security of the countries in an effective manner. Garrett Hardin's paper 'The Tragedy of the Commons' (1968) and the energy crisis of 1970s highlighted research on energy making it widely discussed policy issue throughout the world. Today energy is considered as the backbone of the global economy and its demand is rising at astronomical rate particularly in the developing world. According to World Nuclear Association estimates, as the world population will likely swell to 9 billion from present 6.6 billion by 2050, humankind will consume more energy than the total energy used in all previous history.[1] Even improvements in energy efficiency would not be able to arrest ever increasing global energy demand as it is expected to double by 2050 due to rising population, emphasis on economic growth, urbanization, expanding transport services and other energy dependent services.[2] Due to the modernization and technological development there has been a change not only in the uses of energy as well as in the forms of energy used. The energy has become so much important for the world that no country can ensure development of people, industry, infrastructure and social welfare services without adequate availability of energy. Due to this to electricity is considered vital for any poverty reduction strategy, of any country.

Figure 1 clearly shows the share of global energy consumption at the international level and particularly the developing countries. In the last two and half decades the share of energy consumption has been rising in case of India, China and Middle East whereas, it has been declining for OECD countries while remaining nearly constant for non-OECD countries. And this trend is expected to continue for next two decades from now.

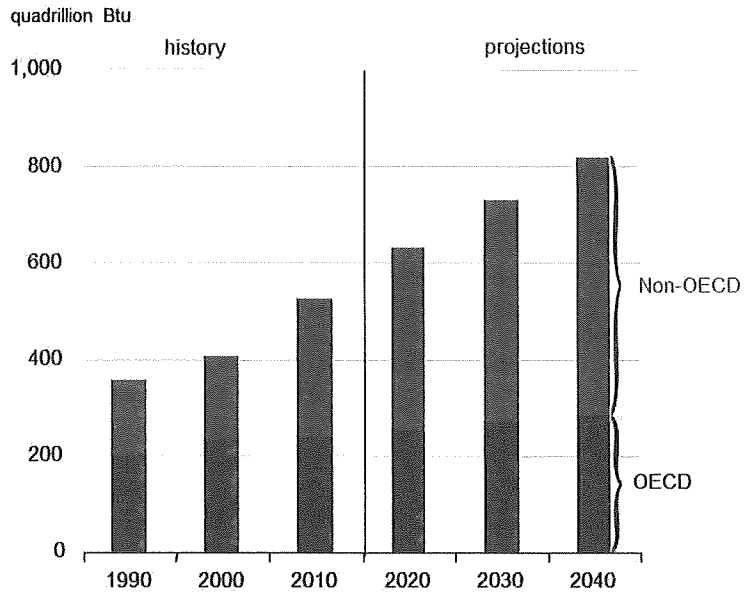
---

* ICSSR Doctoral Fellow, School of Social Sciences, Guru Nanak Dev University, Amritsar.
** Professor and Head, Department of Political Science and School of Social Sciences, Guru Nanak Dev niversity, Amritsar.

1 John Ritch, 'The Necessity of Nuclear Power: A Global and Environmental Imperative' (2008), *www.world-nuclear.org*, at *http://www.world-nuclear.org/Archive/The-Necessity-of-Nuclear-Power/* (last accessed on 12 December 2013).

2 World Energy Council, *2013 World Energy Issues Monitor*, World Energy Council, London, (2013), p. 2.

Figure 1: World Energy Consumption, 1990-2040[3]



According to *World Energy Outlook 2013*, the centre of gravity of energy demand is switching decisively to the emerging economies, particularly China, India and the Middle East, which are driving one-third higher global energy as compared to the rest of the world.[4] The World Energy Council estimates that the global energy sector will require an investment to the tune of half of the current world GDP over the next two decades in order to expand, transform and adapt the energy infrastructure to address the energy challenges.[5] In order to meet the challenge of energy security the scientists all over the world have placed their hopes on nuclear energy as an abundant, cheap and safe option. But the major apprehension which comes with the nuclear power is the threat of nuclear accidents or mishandling. The world has seen three major nuclear accidents namely Three Mile Island (March 28, 1979), Chernobyl Disaster (26 April 1986) and recently Fukushima Daiichi Disaster (11 March 2011). In spite of the predicament caused by these accidents the nations cannot ignore overlook the advantages of nuclear energy and the trend towards use of nuclear energy remains uninterrupted. Countries continue to build nuclear power plants and continue to trade nuclear materials with even more vigour. In such a scenario the need for the nuclear liability regime was apparent.

---

3 Adapted from: U.S. Energy Information Administration (2014) *www.eia.gov, at http://www.eia.gov/analysis/* (last accessed 4 January 2014).

4 International Energy Agency, *World Energy Outlook 2013*, International Energy Agency, France, 2013, p. 59.

5 World Energy Council, *2013 World Energy Issues Monitor*, World Energy Council, London, (2013), p. 2.

This paper is a modest attempt to examine the international nuclear liability regime and the Indian Civil nuclear liability regime which has become a matter of great concern especially after U.S-India Nuclear Deal 2008 and in the aftermath of the Fukushima accident. The paper has been divided into four sections. The first section deals with nuclear power industry and the need for liability laws at the international level. The second section overviews the Indian liability law. The third section throws light on various concerns arising out of Indian industry, and the numerous opposing groups. The last section concludes the paper.

1.1 International Liability Regime

All the countries of the world, developed or developing, face an uphill task of fulfilling the development needs of their citizens. For meeting development requirements of the country for example through industrialization and infrastructure development, energy is very important factor owing to its ever increasing demand by industry as well as by people. The recent decades have seen enormous rise in price, and security of fossil fuel supplies has generated a common problem for the whole world. Concerns about climate change and air pollution, as well as growing demand for electricity, has led the countries to shift towards nuclear power, which emits little carbon dioxide and had built up an impressive safety and reliability record.[6]

The developed countries like the United States, Russia, United Kingdom etc., could not exclusively withhold the consideration for building new nuclear capacity as the developing nations stepped in too. Nuclear power became a central component of national energy policy in the developing economies like China and India.[7] In spite of the obstacles inherit in it, nuclear industry has grown at an immense rate. This has necessitated the need for a system of checks and balances in the form of international nuclear liability regime. Basically nuclear liability is a mandatory responsibility of to pay compensation to victims or to the sufferers by the person or organisation responsible for any nuclear accident. The person or organisations liable to pay may be nuclear power plant operators, equipment or component suppliers or any other individual or individuals who is identified as one being responsible for nuclear accidents. The international framework for nuclear liability is formed by three major international agreements (i) The Paris Convention of 1960, (ii) The Vienna Convention of 1963, and (iii) The 'Convention on Supplementary Compensation (CSC)' for Nuclear Damage of 1997.[8]

1.1.1 Paris Convention-1960

In the post-nuclear weapons world, first nuclear convention that dealt with liability issues was passed by the 'Nuclear Energy Agency (NEA)' in 1960. It was the

---

6 Ernest Moniz, 'Why We Still Need Nuclear Power Making Clean Energy Safe and Affordable' (November / December 2011), www.cfr.org, *at http://www.foreignaffairs.com/articles/1365 44/ ernest-moniz/why-we-still-need-nuclear-power* (last accessed 12 December 2013).

7 Ioannis N. Kessides, "The Future of the Nuclear Industry Reconsidered: Risks, Uncertainties, and Continued Potential", The World Bank Development Research Group Environment and Energy Team *Policy Research Working Paper 6112*, June 2012, pp. at p. 2.

8 Anirudh Burman, 'Legislative Brief: The Civil Liability for Nuclear Damage Bill, 2010' (2010) *www.psindia.org, at http://www.prsindia.org/upload/media/nuclear/final%20brief% 20-%20civil%20 liability%20for%20nuclear%20damage%bill.pdf* (last accessed 20 December 2013), at p. 2.

Convention on Third Party Liability in the field of Nuclear Energy. It is also known as the Paris Convention. It was the first international treaty which introduced the concept of channelling liability to the nuclear operator. It had two major implications as given below:

I. Only the nuclear operator can be held liable for any nuclear accident that fell under the Paris Convention's purview;

II. Only the operator can be liable, i.e. the operator cannot seek financial recourse through third-party lawsuits, indemnity actions, or other legal means.

This convention had limited the maximum amount of liability to 15 million 'Special Drawing Rights (SDRs)' or not more than $24.654 million and not less than 05 million SDRs or $8.218 million. The original Paris Convention was amended in 1963 by the Brussels Supplementary Convention which increased the amount of liability to 175 million SDRs. It laid down provision for a three tier compensation system to rectify the shortcomings in the Paris Convention.[9]

1.1.2 Vienna Convention-1963

The Vienna Convention of 1963 provided for wider geographical coverage and was similar if not identical to the Paris Convention.[10] This convention was drafted and passed by 'International Atomic Energy Agency (IAEA)' and the major difference between Vienna and Paris convention is that former does not limit the damage to the country where the nuclear reactor is installed. It also provides flexibility to the state having the installation, which can limit the recovery in the name of greater good.[11] Rest of the provisions are quite same, like both the conventions engage in legal channelling and restricts to single operator.

1.1.3 Joint Protocol-1988

In 1988 the IAEA and the NEA came up with a Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. The Parties to the Joint protocol are treated as if they are Parties to both conventions. The Joint Protocol which came into force in 1992 also intended to prevent any possible conflicts of law in the case of international transport of nuclear material.[12]

---

9 Nuclear Energy Agency, 'Paris Convention on Nuclear Third Party Liability' *www.oecd-nea.org*, at *http://www.oecd-nea.org/law/nlparis_conv.html* (last accessed 14 December 2013).

10 Rohan Tigadi, 'Critical Analysis of the Indian Civil Nuclear Liability Act, 2010' (May 16, 2012) www.ssrn.org, *at http://dx.doi.org/10.2139/ssrn.2254490* (last accessed 11 December 2013), pp. 1-8, at p. 2.

11 Arya Hariharan, 'India's Nuclear Civil Liability Act and Supplier's Liability: One Step towards Modernizing the Outdated International Nuclear Liability Regime' (2012) 36(1), *William & Mary Environmental Law and Policy Review, at scholarship.law.wm. edu/wmelpr/vol36/iss1/8/* (last accessed 4 January 2014) pp. 223-255, at p. 232.

12 International Atomic Energy Agency, 'Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention' (1992) *www.iaea.org, at http://www.iaea. org/Publications /Documents/Infcircs/Others/infcirc402.pdf* (last accessed 16 December 2013).

1.1.4 Protocol to Amend Vienna Convention-1997 and Convention on Supplementary Compensation

Next in line came the 1997 Protocol to amend the Vienna convention in the post Chernobyl time. This protocol further widened the area of coverage of the accident by including the discretion of the suffering state to decide the extent of area where damage was caused. It also accounted to include the economic loss in the form of loss of tourism or fishing, if the civil laws of the installation state allowed. In other words the protocol extended the recoverable damage to the environmental expenses. Certain changes were also made in the compensation limit. In 1997 another step was taken in the form of supplementary compensation fund for the signatories. It was created by the CSC. It came up in the background of the Chernobyl disaster hence it included many reforms that became important during that time. The fund is collectively provided by contributions from state parties but it is yet to come into force.[13]

As a result of these Conventions, the international community has been able to evolve a few fundamental principles which have provided the framework for nuclear liability legislations throughout the world. According to World Nuclear Association most of conventions and laws regarding nuclear third party liability at the core level have the following principles:

I. Strict liability of the nuclear operator;

II. Exclusive liability of the operator of a nuclear installation;

III. Compensation without any discrimination based on nationality, domicile or residence;

IV. Mandatory financial coverage of the operator's liability;

V. Exclusive jurisdiction (only courts of the State in which the nuclear accident occurs have jurisdiction); and

VI. Limitation of liability in amount and in time.[14]

With the coming up of such rules and regulations a change in the mindset of the countries was seen, as they felt more positive about the usage of the nuclear power and hence the international public opinion also supported use of nuclear power. Various international surveys during the time period of 2005-2010 reported that the bad memories of Three Mile Island accident and Chernobyl disaster had faded away.[15] But this situation could not survive for a long time as the Fukushima nuclear accident turned its head down. It again led to the diversion of attention from the

---

13 World Nuclear Association, 'Liability for Nuclear Damage' (2012) *www.world-nuclear.org*, at *http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Liability-for-Nuclear-Damage/* (last accessed 2 January 2014).

14 World Nuclear Association, 'Liability for Nuclear Damage' (2012) *www.world-nuclear.org, at http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Liability-for-Nuclear-Damage/* (last accessed 2 January 2014).

15 Nuclear Energy Institute, 'Perspectives on Public Opinion' (2010) *www.nei.org*, at *http:// www.nei.org/resourcesandstats/documentlibrary/publications/perspectiveonpublicopinion/per spective -on-public-opinion-june-2010/.pdf* (last accessed 2 January 2014).

positive to the negative side of the nuclear power plants. The developing countries like India had to face the direct consequences of the Fukushima accident as the public opinion in India turned tides against nuclear power and the anti-nuclear movement got strengthened. The Kudankulam and Jaitapur power plants had to face the cost of this incident and the anti-nuclear movement as well.

2.1 Need for the liability Regime in India

Before 2010 India along with Pakistan were the only two nuclear equipped countries in the world which were not signatory to any liability statute dealing with the possibility of nuclear accident. *The Atomic Energy Act, 1962* is the only guiding principle of India, it provides for the control and use of atomic energy for the welfare of the people of India, and for other peaceful matters concerned therewith.[16] This Act does not provide for civil liability of nuclear accident. In India the whole design, construction and operation of the nuclear power plants fall under the purview of central government. Hence, it is the government of India which is fully responsible for any kind of accident in the nuclear plant and also for the compensation related to it. According to the World Nuclear Association estimates there are 435 operable nuclear power reactors in the World and India accounts for 20 out of them.[17] As per the Energy Statistics 2013, published by the Government of India, nuclear power shares only 1% in the energy basket of India[18] still Indian nuclear industry is growing rapidly with a targeted capacity of 35,000 MW by 2020 which has made it a lucrative market for the foreign players but due to the international pressures major nuclear suppliers were unable to utilize this opportunity in India. Indo-U.S nuclear agreement in 2005 became a major breakthrough as it led India to get certain relaxation from the 'Nuclear Suppliers Group (NSG)' by 2008[19] after which India made strong trade relations in this field with several countries. This made it necessary for India to enact a legislation which covers all aspects of civil liability in a transparent manner including possible trans-boundary damage.

As India was not party to any international convention in the field of nuclear liability so it has done certain Inter-Government agreements with the respective states like the 200 MW reactors built with the US assistance in Tarapur were fully indemnified by the Government of India. Even the two Light Water Reactors (2,000 MW) in Kudankulam (KK) are covered by an Inter-Government agreement with Russia. Other States like Canada, France in 2006 and Britain in 2010 have also done bilateral agreements with India for cooperation in the use of nuclear energy for civilian purposes. These are specific agreements and in the absence of a civil liability law, it

16 P.S.A. Pillai, *Law of Tort*, Eastern Book Company, Lucknow, 2010.

17 World Nuclear Association, 'World Nuclear Power Reactors & Uranium Requirements' (January 2014) *www.world-nuclear.org, at http://www.world-nuclear.org/info/reactors.html* (last accessed 8 January 2014).

18 Government of India, *Energy Statics 2013*, Central Statistics Office, Ministry of Statistics and Programme Implementation, Government of India, New Delhi, 2013, p. i.

19 Sun-Joo Ahn, and Dagmar Graczyk, *Understanding Energy Challenges in India: Policies, Players and Issues*, International Energy Agency, France, 2012, p. 81.

would be very difficult for India to add a large number of reactors as planned.[20] Indo-U.S Nuclear Deal and Article VIII of the India-France agreement clearly demanded for the creation of a civilian nuclear liability law in India.[21] While discussing about the requirements of liability regime in India Ramachandran clarifies:

> The idea of enacting a suitable nuclear liability regime in the country was initiated soon after the KK project got underway in 2000 given the concern of a possible fall-out on Sri Lanka in case of a nuclear accident at Kudankulam due to the geographical proximity of the island country. Given the likelihood of trans-border impact from an accident at KK, the project brought in an international element to the whole issue, necessitating a suitable national law in keeping with international practice.[22]

Till 2010 the state owned public sector units namely 'Nuclear Power Corporation of India Limited (NPCIL)' and 'Bharatiya Nabhikiya Vidyut Nigam Ltd. (BHAVINI)', were the sole 'Nuclear Power Plant (NPP)' operators[23] for building and operating nuclear power reactors and had the complete liability in case of any nuclear accident. If India needed private operators to be part of nuclear industry it became mandatory for Indian Government to have a viable nuclear liability regime. Hence, apart from providing compensation to the people in case of any accident the major cause of Indian government to come up with this law was to become a part of international nuclear liability regime. The main proponents of the Bill advocated that the Bill will strengthen India's development on four fronts:[24]

I. It would increase India's ability to produce energy and electricity;

II. It would develop India's defence technology;

III. It would allow for advancements in India's space program; and

IV. It would stimulate global interest and investment in India.

2.2 Overview of Civil Liability for Nuclear Damage Law

In order to clearly define the scope of civilian nuclear liability in case of any nuclear accident, Government of India drafted a Civil Liability for Nuclear Damage Bill. This bill was introduced in Lok Sabha on 7 May, 2010 by the Minister of Science and Technology and Earth Sciences. After the opposition denied its support to Bill seeking a number of revisions in it, it was referred to the Standing Committee on

---

20 Centre for the Study of Science Technology and Policy, 'Civil Nuclear Liability Bill' (2010) *CSTEP Policy Brief-03* (PB-3:8.4.10), *at http://www.cstep.in/sites/default/files/Nuclear Liability (PB-3-8-4-10).pdf* (last accessed 8 January 2014) p. 1.

21 *Supra* note 8, p. 2.

22 R. Ramachandran, 'The Civil Nuclear Liability Bill', (15 April 2010) *www.idsa.in, at http://www.idsa.in/system/files/IB_CivilNuclear%20LiabilityBill_2010.pdf* (last accessed 4 January 2014), p. 3.

23 *Ibid*, at p. 4.

24 CLRA Policy Brief for Parliamentarians, 'Civil Liability for Nuclear Damage Bill 2010: How Civil and How Liable?' (July-August 2010) Policy Brief Series: No. 10, *Centre for Legislative Research and Advocacy, at http://www.clraindia.org/include/CLRA%20Nuke%20Bill% 20policy%20brief.pdf* (last accessed 2 January 2014) pp. 1-4, at p. 1.

Science and Technology, Environment and Forests on May 13, 2010 under the Chairmanship of T. Subbarami Reddy.[25] The Nuclear Liability Bill became controversial due to a number of reasons. The foremost amongst them were the provision on compensation related to capping of nuclear operator liability, the near absence of supplier's liability and the maximum liability amount, etc.[26] The major criticism arose because of the supplier's liability and because of the very low cap reserved as compensation, it was viewed that human life in India was being valued at a far less amount than the lives of others abroad.[27] Some of the primary concerns[28] of the Bill were:

I. It is discriminatory, as it will let foreign suppliers escape liability;

II. The inadequate liability cap amount means that it will be taxpayers' money to pay the remaining compensation if damages exceed Rs. 500 crore;

II. It will allow future accidents resembling Bhopal to occur without adequate repercussions; and

IV. The inadequate system of recourse means victims will have difficulty in receiving compensation.

After three months the Standing Committee tabled its report and stated that being a domestic legislation it should completely reflect the interests of Indian citizens. The committee made major recommendations with regard to the Clause 17 of the Bill opting for a strong and strict supplier's liability. It recommended that Clause 17(b) should be modified as:

> The nuclear incident has resulted as a consequence of an act of supplier or his employees, done with the intent to cause nuclear damage, and such act includes supply of equipment or material with patent or latent defects or sub-standard services.[29]

Though these recommendations were welcomed in India but they raised the eyebrows of the foreign investors' particularly American investors. Deviating from the international practice Indian Law for the first time in the history of international liability regimes made supplier responsible or liable in case of any accident. The lobbyists in America tried to prevail upon Prime Minister Manmohan Singh to amend the bill, but the later keeping in mind the pressure from opposition, Indian media and court's decision on Bhopal Gas Tragedy

---

25 *Supra* note 8, p. 6.

26 Editorial, "Flawed Civil Nuclear Liability Bill", *Economic and Political Weekly*, Vol. XLV No. 12, 20 March 2010.

27 Arya Hariharan, 'India's Nuclear Civil Liability Act and Supplier's Liability: One Step towards Modernizing the Outdated International Nuclear Liability Regime' (2012) 36(1), *William & Mary Environmental Law and Policy Review, at scholarship.law.wm.edu/wmelpr/ vol36/iss1/8/* (last accessed 4 January 2014) pp. 223-255, at p. 250.

28 *Supra* note 24.

29 The Parliamentary Standing Committee on Science & Technology, Environment & Forests, Two Hundred Twelve Report on 'The Civil Liability for Nuclear Damage Bill, 2010 (July-August, 2010)', p. 19.

rejected the demand of the American lobbyists and declared that supplier's liability would stay in the Bill.

The maximum liability in the Indian Bill was kept at 300 Million SDRs ($ 450 Million), and it is akin to the provisions in several other countries of the world. Of this amount, the operator has been assigned a liability up to Rs 500 Crore (about $100 Million) to be made available without any litigation and the government provides the balance. As India has signed the CSC in 2010, so it has become eligible for an additional amount of compensation depending on the number of countries adopting CSC which is yet to come into force.[30] After considerable debate in Parliament and after the recommendations of the Standing Committee the Indian Liability Act was finalised. On 21 September 2010, The *Civil Liability for Nuclear Damage Act*, No. 38 of 2010 received the consent of the President and came into force from 11 November 2011. This Act automatically made India member of the international nuclear liability regime. With its exceptional clause regarding recourse and suppliers liability, passing of this Act marked a watershed moment in the history of liability laws. Government of India has acted pre-emptively by enacting liability law and thus striking a balance between the promotion of nuclear energy development on one hand and fixing accountability of nuclear accidents on other. Passed by the government with the intention to end the isolation in global nuclear commerce, the Act has not been well received by the nuclear industry particularly suppliers. In fact it may prove to be counterproductive in the long run especially for inclusion of right to recourse under Clause 17 of the Act. It may hamper operation of existing nuclear power plants India if the nuclear suppliers keep on insisting the repeal of suppliers' liability from the Act. It is argued that it will pose serious challenge to development of India's nuclear programme in general and nuclear energy generation in particular.

The main provisions of the Act are as given below in the Table.1.

Table 1: Main Provisions of the Civil Liability for Nuclear Damage Act, 2010[31]

Subject	Provisions
Application of the Act (Clause 1)	The Act applies to (a) the whole of India, (b) in and over the territorial waters of India, including economic zones, (c) ships and aircrafts registered in India, (d) artificial islands and installations under India's jurisdiction, (e) it applies only to the nuclear installation owned or controlled by the Central Government either by itself or by any authority or company established by it.
Notification of the nuclear incident (Clause 3)	The 'Atomic Energy Regulatory Board (AERB)' has to notify each nuclear incident within 15 days of its occurrence, unless the gravity of threat and risk involved is insignificant.

30 *Supra* note 20, p. 5.

31 *The Civil Liability for Nuclear Damage Act*, 2010.

Subject	Provisions
Nuclear damage (Clause 2 (g))	The Act defines it as (a) loss of life or personal injury, and (b) loss of, or damage to property caused by a nuclear incident. It also includes (c) damage caused to the environment and economic loss caused due to environmental damage.
Operator (Clause 2 (m))	It is mainly the Central Government or any authority or corporation established by it or a Government company who has been granted a licence under the provisions of the Atomic Energy Act, 1962 for the operation of that installation.
Operator's Liability (Clause 4)	As per the Act operator is liable if (a) Damage is caused by a nuclear incident in that nuclear installation, (b) Damage is caused by nuclear material coming from, or originating in a nuclear installation, and before its responsibility has been assumed by another operator, (c) Damage is caused by nuclear material sent to that installation, and after the operator has assumed charge of the nuclear material.
Exceptions to the operator's Liability (Clause 5)	The Act provides for certain exceptions in case of operator's liability. These include (a) grave natural disasters, (b) armed conflict, civil war, or terrorism, or (c) damage suffered by person due to his own negligence or acts of commission or omission. (d) Operator is also not liable in case of the nuclear installation, or to the property on the site used or to be used, or to the means of transport used to carry nuclear material.
Liability amounts (Clause 6)	(a) The maximum amount of liability for each nuclear incident shall be 300 million SDRs which equals approximately Rs 2100 crore. (b) The maximum liability on an operator is Rs 500 crore; this amount can be changed by the central government notification but cannot be reduced below Rs 100 crore. The central government will cover any liability higher than this up to SDR 300 million. In case the plant is owned by the central Government, it will bear the entire liability. (c) The operator cannot begin operating the nuclear installation without getting an insurance policy or financial security to cover his liability (except where the nuclear installation is owned by the central government).
Right to recourse (Clause 17)	The Act gives the option of recourse in case of (a) There is an express contract in writing giving the operator such a right. (b) The nuclear incident has occurred due to a deliberate or negligent act of the supplier, or his employee,

Subject	Provisions
	and (c) The incident has been caused by a deliberate act or omission of a person done with intent to cause damage.
Persons who can claim compensation (Clause 14)	The right to claim compensation from nuclear damage can be exercised by (a) a person sustaining injury, (b) owner of damaged property, (c) legal representative of a deceased person, or (d) an authorized agent. An application is required to be made within three years from the date of the person having knowledge of nuclear damage. This right expires after ten years from the date of notification of the nuclear incident (Clause 18).

Source: Compiled from the Civil Liability for Nuclear Damage Act, 2010

In a nutshell the *Civil Liability for Nuclear Damage Act,* 2010 fixes liability for nuclear damage and specifies procedures for compensating victims. It fixes no-fault liability on operators and gives them a right of recourse against certain persons and it also caps the liability of the operator at a maximum of Rs.1,500 crore. It states that all operators (except the central government) are required to take insurance or provide financial security to cover their liability. The Act also clearly mentions the procedure of compensation and the authorities who will assess and award compensation for nuclear damage. Those not complying with the provisions of the Act can be penalized. However, the Act has not been well-accepted by one and all concerned. The Act has invited criticism from different quarters especially from nuclear industry that supply components to nuclear plant operators. Following section assess the concerns related to the Liability Act.

3.1 Assessing the Concerns against the Civil Liability for Nuclear Damage Act

Drafted with the intent to attract foreign nuclear investors and manufactures and lay down nuclear governance structures in India, the Civil Nuclear Liability Law of India has opened Pandora's Box of criticism from the all concerned. The concerns arising from different quarters at draft stage of the Act became louder after its notification by the Central Government. Against the concerns raised by the opposition parties, the government defended its position inside as well as outside the Parliament. The government has tackled concerns of the nuclear industry, domestic as well as foreign by incorporating suitable provisions in the Act. During drafting and passing stage of the Act, the protest by the environmentalists and anti-nuclear entity also got strengthened. This section of the paper delves into these concerns by accessing them under three categories- Political, Industry and Environment.

3.1.1 Political Concerns

The political atmosphere was charged since the negotiation started for Indo-US civil nuclear deal. The political activity regarding nuclear matters further reactivated with the intent of Government to legislate on nuclear liability becoming public. The battle

lines were again drawn between the Government and the opposition particularly Bhartiya Janta Party (BJP) and Left parties leading the attack of criticism. The political concerns can be categorised as one emerging from Government side and other from the opposition and the Left front.

3.1.1.1 Government's Concern

The government's concern on having such a law stems from two perspectives, first is demand of global nuclear industry and second, politico-domestic factors. All over the world civil liability regime is in place and it was long overdue in India. Kind of criticism that the Central Government has faced in the wake of extent of loss of human lives in Bhopal Gas leak case, escape of responsibility of Union Carbide and inadequate financial compensation to victims. It became a prominent debatable issue in the media as linkages were drawn with the Bhopal gas tragedy of 2-3 December, 1984. The linkages got stronger because the judgment by the Supreme Court on the Bhopal gas tragedy was pronounced during the same time. The timing of judgment brought Bhopal gas disaster into limelight. Indian media, the major opposition party the BJP, the Left front and the general public felt concerned. The major criticism against the Bill came because it was being considered as a tool in the hands of foreign investors particularly American, compromising the Indian interests. Hence, the Bill was minutely discussed in public forum and the Parliament.

3.1.1.2 Opposition and Left

The basic point of debate between the government and the opposition is regarding the clause 17 (b) i.e. the suppliers' liability. Getting strong antagonism from the nuclear industry all over the world and domestic companies, government was thinking to do away with the clause viewing it as against the interest of the investment in the sector. But this step of government invited more strong hostility from the Left parties and the BJP. The BJP and the Left parties, questioned the government that why India is bending over backwards to meet the business demands of America, or France or Russia. They criticized government by saying that in order to allure investment in India the government is compromising the interests of the nation by diluting suppliers' liability provision from the Act. In fact under the pressure of the public, the Left parties, the BJP and media, Prime Minister Manmohan Singh had to give a statement in the Parliament clarifying that the interests of India will not be conversed and the suppliers' liability clause will not be diluted from the Act. Even after the Act was passed, the 'Communist Party of India-Marxist (CPI-M)' raised questions on some of its provisions which can lead to the dilution of the Act in future. In a statement issued by the Politburo of the party it demanded from the parliament to review the rules and adopt steps to ensure that the spirit and content of the law is not diluted in any way.[32] Accusing the government of becoming "a real suspect" on the nuclear deal and liability issues, the CPI-M National Secretary D Raja said, "The

[32] Communist Party of India (Marxist), 'Dilution of Nuclear Liability Law Press Statement' (17 November 2011) *www.cpim.org, at http://www.cpim.org/content/dilution-nuclear-liability-law* (last accessed 13 January 2014).

government is consciously going ahead to satisfy the US and dilute the laid-down law and now that has been exposed."[33] The BJP also alleged Prime Minister Manmohan Singh that changes in the Liability Act by the government 'has allowed this to give a gift to American companies during his forthcoming visit to the US'. The Left parties openly warned the government that any such step can lead to drastic political results for the UPA-II. The CPI-M Politburo expressed its concern regarding India doling out favour to the US as:

> It is evident that the UPA government is succumbing to the pressure of the US administration to safeguard their companies' interests. But this cannot be at the expense of the interests of the country and the safety and security of the Indian citizens.[34]

3.1.2 Nuclear Industry's Concerns

As far as the corporate world or the nuclear industry was concerned, it was feared that after the formulation of such a strict Act, the big industrial houses or the foreign companies in the nuclear field will not be ready to invest in India. The Act brought uncertainties in the minds of foreign investors. Not only the foreign investors but the domestic corporate houses also had qualm against the law. The major point of concern with regard to the corporate houses was generated by the suppliers' liability. The Clause 17(b) of the Act allows the operator to have legal recourse to the supplier for up to 80 years after the plant starts up if the "nuclear incident has resulted as a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services."[35]

3.1.2.1 Foreign Suppliers

The clause giving recourse to the supplier for an operational plant is contrary to international conventions and undermines the channelling principle fundamental to nuclear liability. This is generally seen as confusing, and is not satisfactory to major suppliers On August 30, 2010, The New York Times reported a story describing the law as 'bucking international norms by making suppliers potentially liable for nuclear accidents and it questioned whether any foreign or Indian energy company would now be willing to enter the Indian civil nuclear market.'[36]

All the suppliers of Russia, America, France, Britain and Canada became worried about the provisions of the Act. The French Ambassador to India has been quoted as saying "we are studying the Act and its implications for the Jaitapur power plant for which Areva will supply reactors",[37] though they are very much concerned about the

---

33 "Row Over CCS Dilution on N-Liability Pact: Govt Denies Act of Water Down, Left, BJP cry foul," *The Echo of India*, 20 September 2013, at p. 3.

34 *Ibid.*

35 *Supra* note 31.

36 Lisa Curtis, "India's Flawed Nuclear Legislation Leaves US- India Partnership Short", *Heritage Foundation Report*, No. 2997, 2010, *www.heritage.org, at http://www.heritage. org/research /reports/2010/08/indiasflawed-nuclear-legislation-leaves-us-indiapartnership-short* (last accessed 28 January 2013) p. 1.

37 Sitakanta Mishra, "Self Score in Nuclear Trade," *Geopolitics,* Vol. IV, Issue VI, November 2013, p. 69.

stringency of the law but openly they are saying that "they will respect Indian laws."[38] Even according to the American companies the Indian law poses to be a big burden on suppliers. They are worried more about Clauses 17 and 46 and fear that this could mean unlimited liability on them. The Early Works Agreement signed between the NPCIL and Westinghouse has kept the 'right of recourse' clause to be decided at a later stage.[39] Canadian Consulate General Richard Bale cautioned foreign suppliers and manufacturers will not feel attracted to work in India unless until the provision of right to recourse in the Act is not amended to their favour.[40] In order to find a way out and to end the uncertainties with regard to the Act, 'Department of Atomic Energy (DAE)' on 11 November 2011 by a notification came up with a set of Rules to supplement the Act.[41] But rather than simplifying the provisions of the Act, these rules further complicated the whole situation.

3.1.2.2 Indian Suppliers

Even the Indian supplier like 'Larsen & Toubro (L&T)' is feeling the heat of the Act, and has termed it as a confusing one.[42] The demoralised situation of domestic suppliers can be substantiated from the fact that no contract has been signed between NPCIL and domestic suppliers. For the last three years, Indian companies like Walchand, L&T, Bharat Heavy Electrical Limited and Godrej & Boyce have quietly expressed their disappointment towards the Act. Though the domestic companies are not openly keeping their view point against the government or the Act but they are grouping under a common platform called the 'Indian Atomic Energy Forum' to lobby for relaxed provisions for domestic entities.[43] Not only the big suppliers but even the small suppliers in India like Kay Bouvet (Stara) are feeling discouraged and disincentivized because liability amount is far more than their annual turnover. The nuclear programme may be affected if they do not participate in nuclear trade with the operators on account of Clause 17 (b) of the Act. Therefore coming months will be challenging for the Indian nuclear industry, that how the NPCIL floats its tender and how suppliers react to it. World Nuclear Association remarks that to resolve the issue Planning Commission of India in October 2013 interpreted the Clause that "under the 2010 law the domestic plant operator could limit the amount as well as duration of the liability that accrues to foreign suppliers, so that the liability is limited and therefore insurable."[44] Still the suppliers are cynical about such interpretation even by the highest policy making body of the country.

---

38 *Ibid.*

39 *Ibid.*

40 "Canada wants Relaxation in India's Nuclear Liability Rules", *The Hindu,* 1 December, 2013.

41 Department of Atomic Energy, 'Civil Liability for Nuclear Damage Rules 2011' (2011), Government of India, New Delhi.

42 World Nuclear Association, 'World Nuclear Power Reactors & Uranium Requirements' (January 2014) *www.world-nuclear.org,* at *http://www.world-nuclear.org/info/reactors.html* (last accessed 8 January 2014).

43 Sitakanta Mishra, "Self Score in Nuclear Trade," *Geopolitics,* Vol. IV, Issue VI, November 2013, p. 69.

44 World Nuclear Association, 'World Nuclear Power Reactors & Uranium Requirements' (January 2014) *www.world-nuclear.org,* at *http://www.world-nuclear.org/info/reactors.html.* (last accessed 8 January 2014).

3.1.2.3 Concerns of Plant Operators

Due to liability regime coming into force in India, there are factors which can cause worry for the nuclear power plant operators. One factor of worry can be rise in cost of producing and selling electricity. The rise in cost will be from the enhanced prices of components by suppliers to make up for insurance premiums that the suppliers have to shell out for insurance cover that they have to have to deal with the situation if operator exercises right to recourse in the event of nuclear accident. In this scenario operator has to raise electricity prices to meet rising input costs. Hence, the Act has changed the economy of nuclear energy in India. Further, the uninterested attitude of domestic as well as international suppliers has also added to the problems of the operator. In spite of attracting investment and suppliers to Indian nuclear industry, the Act has freighted them. Already nuclear energy has to negotiate many challenges and it will be another stumble block for the operator.

3.1.3 Environmental Concerns

India's nuclear projects have been facing a lot of challenges with the growing opposition from the anti-nuclear lobby. The anti-nuclear lobby in India has grown strong with the years and after the protests in Kudankulam and Jaitapur and particularly in case of Civil Liability for Nuclear Damage Act. The general assessment about anti- nuclear protests in India has been expressed by former chief of the NPCIL Mr. S.K. Jain that the global anti-nuclear lobby is fuelling protests in India.[45] The argument given by the anti- nuclear group is that the India's nuclear energy programme has been a product of 'nu-colonization'.[46] It also believes that "Indian nuclear agreements that allow the setting up of power plants by countries like Russia in Kudankulam, France in Jaitapur and the US in Haripur (now scrapped) are a replication of the colonization process."[47] In the wake of these arguments the Act of India is criticized by the anti-nuclear lobbyists.

After the Fukushima Diachii nuclear accident the anti-nuclear movement in India got strengthened and the result was Kudankulam and Jaitapur protests. Again in 2013 the Act of India was in news when ahead of Prime Minister Manmohan Singh's visit to the US, Attorney General G. E. Vahanvati was reported to have a legal opinion by saying 'that it is upto the nuclear plant operator to invoke section 17 of the Act regarding liability of suppliers in case of a mishap.' This statement came up in the time when talks were going on between NPCIL and the US-based operator Westinghouse Electric Company to sign a trade agreement. The statement made by the Attorney General raised question on the intentions of the government.

Jumping into the debate the Greenpeace India (non-governmental organisation) in September 2013 threatened to legally challenge the government, if they attempt to

---

45 S.K. Jain in an interview to *Business Standard*, 29 November 2010.

46 The term Nu-colonization (nuclear + colonization), has been coined by the National Alliance of Anti-nuclear Movements (NAAM).

47 Pardeepa Vishwanathan, "Kudankulum Nuclear Power Plant: Contested Standpoints", *Nuclear South Asia*, January- March 2012, pp. 1-20, at p. 12.

make any changes in the existing law.[48] Further questioning the safety of Indian reactors Greenpeace argued that if the 'reactors are as safe as they (government) claim, why these companies are not confident that there would be no occasion for their equipment to fail and therefore no compensation'. Such arguments got heat from the Indian anti-nuclear lobby as well and they discarded India's nuclear energy expansion in itself and commented that when 'Germany and Japan have turned their backs on nuclear energy options, why India is willing to pay such enormous price.'[49]

Though trying to downplay the controversy government cleared its situation by saying that there will be no dilution on the issue and the interest of India will be protected. External Affairs Minister Salman Khurshid said while India needs energy, it will get it at its "own terms and conditions."[50] In October 2013 DAE set up two committees with a more 'scientific and rational' approach to deal with the issues raised by the nuclear industry. According to the DEA:

> *The committees will assess the probabilistic safety analysis to identify a model that will assess probabilities of particular equipment or a set of system to fail in a manner that can lead to an accident. Based on the study there would be a rational basis for working out an actuarial approval to decide on the quantum of liability.*[51]

The main committee comprises representatives from India's top most entities in the atomic field i.e. Bhabha Atomic Research Centre, Indira Gandhi Centre for Atomic Research and NPCIL.

4.1 Conclusion

It has become difficult for the government to swim the big tide of Civil Liability for Nuclear Damage Act. It has been looking forward to various options in order to cater to the needs of suppliers and at the same time it is also putting effort to assure public, media and opposition parties that the national interest will never be compromised. In this whole process government has certain options like making an amendment to the Act but government will never give it a second thought as this can lead to a political suicide keeping in mind the upcoming Lok Sabha elections of 2014. The other option which many analysts have put forward and which government is pursuing to certain extent is having a procedural and institutional understanding with the suppliers and the operator; government can also work on the feedback mechanism with regard to the components with the suppliers. Fixing the suppliers liability time or having a mechanism by which suppliers are made to contribute in a different manner towards the liability are also another option for the government to work on but the opposition

---

48 Greenpeace India, "Greenpeace to Challenge any Dilution of Indian Nuclear Liability Act: Releases Counter Legal Opinion on the Circumvention of Supplier Liability" (2013), *www.greenpeace.org, at http://www.greenpeace.org/india/en/Press/Greenpeace-to-challenge-any-dilution-of-Indian-Nuclear-Liability-Act/* (last accessed 12 January 2014).

49 Sitakanta Mishra, "Self Score in Nuclear Trade", *Geopolitics,* Vol. IV, Issue VI, November 2013, p. 70.

50 *"There will be no Dilution of Nuclear Liability Law, says Govt.", The Hindu*, 20 September 2013.

51 World Nuclear Association, "World Nuclear Power Reactors & Uranium Requirements" (January 2014) *www.world-nuclear.org, at http://www.world-nuclear.org/info/reactors.html* (last accessed 8 January 2014).

particularly the Left parties are very reluctant on supporting government to work on this part. Irrespective of 18 amendments which government brought in the *Civil Liability for Nuclear Damage Act*, 2010 certain provisions are yet undecided. The general concern regarding the liability issue is that the world has already faced three disastrous nuclear accidents while India still has not yet come out of the Bhopal gas tragedy. The victims of the tragedy have not received their part of compensation and justice so far, hence, for a developing country like India to pursue its indispensable nuclear development plans will not be easy. For a developing country like India nuclear energy is the most clean, safe and sustainable source of energy, especially when India is credited to have advanced 3-stage blueprint of nuclear power plants. The Civil Liability for Nuclear Damage Act of India again set up an example in the World that it can withstand the international pressures without compromising its public interests. Though it is also important to remember that everything comes with a cost but the cost cannot be the lives of the citizens. Therefore, the government should take necessary steps before moving ahead to any decision. There is need for dialogue, debates and discussions in order to address the concerns of the industry in the Act while not at all compromising safety concerns of Indian people as safety of the citizens is the most important and basic duty and responsibility of the government.

ISSUES AND CONSTRAINTS IN IMPLEMENTATION OF THE RIGHT TO INFORMATION ACT, 2005

Dr. Ritu Salaria*

> Knowledge will forever govern ignorance and a people who meant to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means for obtaining, it is but a prologue to force or tragedy or perhaps both..... James Madison

India being a welfare State, it is the duty of the government to protect and enhance the welfare of the people. It is obvious from the Constitution of India that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy.[1]

The citizen's right to know the facts, the true facts, about the administration of the country, is, thus, one of the pillars of a democratic state. And that is why the demand for openness in the government is increasingly growing in different parts of the world.[2]

The paper focuses on the various aspects of the issues and constraints involved in the effective implementation of this Act. Right to information gives the people the right to make fair choices and makes a better informed citizenry. In the process of seeking information under this Act there are various problems which are faced by a common man. For a lay man this right is still not easily available. The problems arise at various stages in this whole process of seeking information. It is evident from the study that it is a tedious process. The citizen's right to know the facts, the true facts, about the administration of the country is not very easy to achieve. The process is very cumbersome as shown in the study of this paper.

1.1 The need for Right to Information Act

In recent years, there has been an almost unstoppable global trend towards recognition of the right to information by countries, intergovernmental organizations, civil society and the people. The right to information has been recognized as a fundamental human right, which upholds the inherent dignity of all human beings. The right to information forms the crucial underpinning of participatory democracy - it is essential to ensure accountability and good governance. The greater the access of the citizen to information, the greater the responsiveness of government to

---

* Assistant Professor of Law (part-time), Department of Laws, Panjab University, Chandigarh.

1 J.N. Baroowala, *The Right to Information Act, 2005*, 5 (2010).

2 *S.P. Gupta v. Union of India,* AIR 1982 SC 149.

community needs. Alternatively, the more restrictions that are placed on access, the greater will be the feelings of 'powerlessness' and 'alienation'. Without information, people cannot adequately exercise their rights as citizens or make informed choices.[3]

The free flow of information in India remains severely restricted by three factors:

(i) The legislative framework includes several pieces of restrictive legislation, such as the Official Secrets Act, 1923;

(ii) The pervasive culture of secrecy and arrogance within the bureaucracy; and

(iii) The low levels of literacy and rights awareness amongst India's people. The primary power of RTI is the fact that it empowers individual Citizens to requisition information. Hence without necessarily forming pressure groups or associations, it puts power directly into the hands of the foundation of democracy- the Citizen.

In the Constitution of India Article 19 has been interpreted to mean that right to information is one of the essential ingredients of Article 19(1).[4]

After going through Article 19 of the Constitution of India, it is pertinent to note that the interpretation of the provisions of the Constitution is the duty of the Supreme Court of India and the law declared by the Supreme Court is binding under Article 141 of the Constitution of India which reads as under:

> "the law declared by the supreme court shall be binding on all courts within the territory of India."[5]

When we come to the interpretation of Article 19 of the Constitution *vis-a-vis* right to information, the Supreme Court of India has laid down that right to information is a fundamental right under Article 19(1)(a) of the Constitution. The State under clause (2) of Article 19 of the Constitution, however, is entitled to impose reasonable restrictions, *inter alia,* in the interest of the State.[6]

Right of information is a facet of the freedom of "speech and expressions" as contained in Article 19(1)(a) of the Constitution. Right of information, thus, indisputably is a right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose.[7]

---

3 Available at *http://www.legalserviceindia/articles/rti_dh.htm.* (accessed on 21.01.2013).

4 *The Constitution of India*, Article 19: Protection of certain rights regarding freedom of speech etc.- (1) all citizens shall have the right-(a) to freedom of speech and expressions;
Reasonable restrictions in Clause(2) are: nothing in sub-clause (a) of clause(1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

5 *Supra* note 2 at p. 6.

6 *People's Union for Civil Liberties v. Union of India*, AIR 2004 SC1442.

7 *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket. Association of Bengal,* AIR 1995 SC 1236.

The people of this Country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.[8]

1.2 Right to Information and the National Commission Constituted to Review the Working of the Constitution

The right to information is such a basic right today, as considered by NCCRWC in its report under the chairmanship of Justice M.N. Venkatachaliah, dated March 31, 2002, that it should be guaranteed and needs to be given real substance. Accordingly, NCRWC suggested that Article 19(1)(a) of the Constitution of India may be amended as:

> (i) All citizens shall have the right Sub-clause (a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas.
>
> (ii) nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or preventing the disclosure of information received in confidence except when required in public interest.

1.3. How Fundamental Right to Information is a Basic Human Right?

The freedom of speech and expression includes right to acquire information and disseminate it. Freedom of speech and expression is necessary for self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts.[9]

The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.[10]

In one of the leading English cases, Lord Simon of *Glaisdale*,[11] has said that the public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be

---

8 *State of Uttar Pradesh v. Raj Narain,* AIR 1975 SC 865.

9 *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal,* AIR 1995 SC 1236.

10 *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India,* AIR 1986 SC 515.

11 *Attorney General v. Times Newspapers Ltd.*, (1973) 3 All ER 54.

sufficiently informed that they may influence intelligently the decisions which may affect themselves.

Right to information is considered as a basic human right and in Article 19 of the *International Covenant on Civil and Political Rights*,[12] declares that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and to seek, and receive and impart information and ideas through any media and regardless of frontiers".

The Supreme Court of India while interpreting Article 19(1)(a) of Constitution of India held that the right to information is a facet of the freedom of "speech and expression" as contained in Article 19(1)(a) of the Constitution of India. Right of information, thus, indisputably is a fundamental right, a basic human right.[13]

Under Article 19 (1)(a) the freedom of expression has four broad social purposes to serve:

(i) It helps an individual to attain self-fulfilment ;

(ii) It assists in the discovery of truth;

(iii) It strengthens the capacity of an individual in participating in decision-making; and

(iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

In our democratic set up the enlightenment of the electorate is very important for the fair functioning of the democracy i.e., for the fair election of the representatives of the power of the people of India. It is we, the people of our country, who will decide the future of our country. So, it is possible only if we are well informed about the choices we have to make. It is only the knowledge, the information that can show us the right path.

All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.[14]

The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the government must be the rule and secrecy an exception.

Access to information is at the foundation of a democracy. The right to know has been seen to be at the base of the democratic process and in *Romesh Thapar v. State of Madras*,[15] the Supreme Court of India found the freedom of discussion to be

12 India ratified this covenant in 1978.

13 *Supra* note 6.

14 *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India,* AIR 1986 SC 515.

15 AIR 1950 SC 124.

included in Article 19(1)(a) of the Constitution and the freedom of press to be an aspect of the freedom of discussion so that members of a democratic society should be sufficiently informed to 'be able to form their own beliefs and communicate them freely. The fundamental principle is the people's right to know'. Later in many cases this view has been amplified by the Supreme Court.[16]

In *Maneka Gandhi v. Union of India*,[17] in *S.P Gupta v. Union of India*,[18] it has been held for a clean and healthy administration and effective participatory democracy the information or the means of obtaining it, is very important.

1.4 Legislative Background of the Right to Information Act, 2005

The Preamble of our Constitution embodies the essence of democracy and declares the 'people' as the source of power in our country. So the citizen's have fundamental right to know what the government is doing in its name. Freedom of speech is life and blood of democracy. The free flow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a break on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration in the country.[19]

From time to time various provisions were made in various Acts passed by the legislature for imparting information to the citizens. Like:[20]

Indian Evidence Act 1872: *Sections 74 to 78* gives right to the person to know about the contents of the public documents and in this connection *Section 76 of the Indian Evidence Act* lays down that the public officials shall provide copies of public documents to any person who has the right to inspect them. Under the *Factories Act*, compulsory disclosure of information has to be provided to factory workers regarding dangers including health hazards arising from their exposure to dangerous materials and the measures to overcome such hazards. Under *Section 25(6) of the Water (Prevention and Control of Pollution) Act,* every state is required to maintain a register of information on water pollution and it is further provided that so much of the register as relating to any outlet or any effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises. Under *Section 33A*[21] *of the Representation of the People Act,* a candidate contesting elections is required to furnish in his nomination paper the information in the form of an affidavit concerning: (i) accusation of any offence punishable with two or more years of imprisonment in any case including the

16 *Sakal Papers (P) Ltd., v. B.N. Sarpotdar*, AIR 1962 SC 305; *Bennett Coleman & Co v. Union of India,* AIR 1973 SC 106; *Indian Express Newspapers (Bombay) P. Ltd. v. Union of India*, AIR 1986 SC 515; *Dinesh Trivedi v. Union of India*, (1997) 4 SCC 306; *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

17 AIR 1978 SC 597.

18 AIR 1982 SC 149.

19 *R v. Secretary of State for the Home Department Ex. P. Simms*, (2000) 2 LR 115 (AC).

20 *Supra* note 2 at p. 19.

21 Inserted by Act 72 of 2002, s. 2 (w.e.f. 24-08-2002).

framing of charges in pending cases; and (ii) conviction of an offence and sentence of one or more than one year imprisonment.

During the last decade, the right to information has got such a momentum as never before and on the civil societies side also some organizations, social activists and individuals did excellent work in this field. *The Mazdoor Kissan Shakti Sangathan (MKSS in 1990)* has done a great job in the field of right to information in rural India and its struggle for minimum wages and to get the information regarding muster rolls being maintained ultimately led the Government of Rajasthan to enact Right to information Act and then various other state governments enacted the Right to Information Acts, *viz.* The Tamil Nadu Right to Information Act, 1997; The Goa Right to Information Act 1997; The Karnataka Right to Information Act 2000; The Assam Right to Information Act 2001; The Madhya Pradesh Right to Information Act 2001; The Delhi Right to Information Act 2001; The Orissa Right to Information Act 2002; The Maharashtra Right to Information Act 2003; the Jammu and Kashmir Right to Information Act, 2004.

Then Government of India enacted Freedom of Information Act, 2002, which received the assent of the President of India on 6th January, 2003 with an aim to make the government more transparent, and accountable to the public. But with the passage of time, it was felt that this Act has not fulfilled the aspirations of the citizens of India in the field of right to know and to get information and therefore this Act need to be more progressive, participatory and meaningful. To achieve this object, the Right to Information Bill was introduced in the Parliament in December 2004 and was passed by both the Houses of Parliament with major amendments in May, 2005. It received the assent of the President of India on June 15, 2005.

1.5 RTI Act is a Social Welfare Legislation and has empowered Public Interest Litigation

The Rule of law is the common way of life in a civilized society and it is also used to protect the interests of the society and the public at large to fulfill the ideals of the modern welfare state. The interpretation of the law is the function of judiciary in a democracy like ours and the main concern of administration of justice is protection of the rights of the people for the well-being of its subjects. The right to freedom of speech and expression guaranteed under Article 19(1) of the Constitution of India includes the right to receive and inspect information. Freedom of speech is the lifeblood of democracy. The Supreme Court in *Union of India v. Association of Democratic Reforms,*[22] has passed various directions for the disclosure of information by the candidates who are seeking election to Parliament or a State Legislature like information about any offence committed by them, details of property and assets, any liabilities, educational qualification etc. So, the right to get information in democracy is recognised all throughout and it is a natural right flowing from the concept of democracy.[23]

---

22 AIR 2002 SC 2112.

23 *Supra* note 2 at p. 102.

1.6 Structural-Functional Framework

The RTI Act mandates a legal-institutional framework to establish a practical arrangement for the right to access public information. It prescribes both the mandatory disclosure of certain kinds of information by public authorities and the designation of public information officers (PIOs) or assistant public information (APIOs) in all public authorities to attend to requests from citizens for information. It also provides citizens the right to appeal. Further, the Act mandates the constitution of State Information Commissions (SICs) and a Central Information Commission (CIC) to enquire into complaints, hear appeals, and oversee and guide its implementation. The Act imposes certain obligations on public authorities and the Information Commissions. The Act includes the provisions for imposition of penalties in case of non-compliance of the provisions of the Act.[24]

1.7 Political Parties are also Public Authorities:

In the case of *Subhash Chandra Aggarwal and Anil Bairwal v. Political Parties,*[25] it is held that thirty percent of their income which these political parties would have otherwise paid by way of income tax has been given up in their favour by the Central Government. No one can dispute that this is substantial financing, though indirectly. Added to this the concessional allotment of land and buildings in prime locations in the national capital and in several state headquarters. The political parties enjoy an almost unfettered exemption from payment of income tax, a benefit not enjoyed by any other charitable or non-profit non-governmental organisations. Political parties affect the lives of citizens, directly or indirectly, in every conceivable way and are continuously engaged in performing public duty. It is, therefore, important that they become accountable to the public.

As on 12 August 2013,[26] a bill was introduced in the Lok Sabha to keep political parties out of the ambit of the RTI Act and negate a Central Information Commission (CIC) order to this effect. The Right to Information (Amendment) Bill, 2013 seeks to insert an explanation in Section 2 of the Act which states that any association or body of individuals registered or recognised as political party under the Representation of the People Act, 1951 will not be considered a public authority. The CIC order had termed Congress, Bharatiya Janata Party, the Bahujan Samaj Party, the Nationalist Congress Party, the CPI and the CPI-M as political authorities.

In an all-party meeting called before the beginning of the monsoon session of Parliament, parties cutting across ideologies had opposed the July 10 verdict of the apex court that had struck down a provision in the electoral law that protects a convicted lawmaker from disqualification on the ground of pendency of appeal in higher courts. Government is working overtime to negate the order by seeking a review and even trying to bring parties on board for a constitutional amendment for this.

---

24 Pankaj K.P Shreyaskar, "Investigating Compliance of the RTI Act," *Economic and Political Weekly*, Vol. XLVIII. No. 9, March 2, 2013. p. 19.

25 File No. CIC/SM/C/2011/001386. decision dated 3rd June 2012.

26 Available at *www.indiatv.com/article/india/404871*. (accessed on 21-03-2014).

1.8 The Right to Privacy and the Right to Information

The scheme of the Act contemplates for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. It was aimed at providing free access to information with the object of making governance more transparent and accountable. Another right of a citizen protected under the constitution is the right to privacy. This right is enshrined within the spirit of Article 21 of the constitution. Thus, the right to information has to be balanced with the right to privacy within the framework of law.[27]

19. Areas of Major Concern in the Implementation of the RTI Act 2005[28]

It is evident now that India's rights to information laws have in a short period of time made the people aware of their rights in a whole new way. In developing countries, which face the twin challenges of corruption and inefficiency in governmental institutions and the need for rapid economic and social progress, the operation of right to information laws have shown they hold vast potential for transformation. This Act has given the citizens an instrument to directly challenge the system. So, during the course of its implementation over the period of time since its enforcement, many issues regarding it effective working have cropped up. These issues require concern and immediate remedial measures need to be adopted.

The Department of Personnel and Training (DoPT) in 2009 had engaged PricewaterhouseCoopers (PwC) for assessing and evaluating the level of implementation of the Act with specific reference to the key issues and constraints faced by the "Information Providers and "Information Seekers".[29]

This report has been prepared by PricewaterhouseCoopers (PwC) in association with IMRB (market research partner). This study takes into account the feedback of over 2000 information seekers and over 200 information providers across public authority (PA) at Centre, State, and local levels in 5 States. It also includes feedback of 5000 citizens with respect to their awareness of the RTI Act. As part of the study, the team also conducted four national workshops, in which Central Information Commissioners, State Information Commissioners, Civil Society Organisations, and the media participated. Apart from this, the team has also (i) participated in several seminars conducted by Civil Society Organisations, (ii) conducted various focused group discussions/one to one meeting with several stakeholders, including PIOs and first appellate authorities. The issues and constraints which were found are discussed below:[30]

---

27 Interpreted by the Supreme Court of India as a fundamental right within ambit of Article 21.

28 The areas of major concern are based on the survey conducted by the Department of Personnel and Training. The Report is available at *http://rti.gov.in/rticorner/studybypwc/index-study.htm.* accessed on 15 December 2013 at 5:00 p.m.

29 *Ibid.*

30 *Ibid.*

1.9.1 Issues faced by Information Seekers:

(i) *Faced in filing applications:* Section 27(1), 28(1) and Section 6 of the RTI Act requires the PIOs to provide assistance to the applicant in drafting and submission of the application. But, practically there is non-availability of user guides for the applicants. The survey shows 52% of the citizens surveyed requested availability of a user guide/ manual at all the Public Authorities.[31]

(ii) *Low public awareness and quality of awareness:* Section 26 provides provision regarding public awareness about how to exercise the rights under the Act. Survey shows only 15% of the respondents were aware of the RTI Act.[32]

(iii) *Poor quality of information provided:* the survey shows that more than 75% of the citizens are dissatisfied with the quality of information being provided.[33]

(iv) *Constraints faced in inspection of records:* the discussion with the PIOs during the survey shows that 89% of the PIOs did not use the provision for inspection of records.[34]

1.9.2 Issues faced by the Information Suppliers:

(i) *Failure to provide information within 30 days:* During the study, more than 50% of the information seekers mentioned that it took more than 30 days to receive the information from the PIO. The experience of citizens from disadvantaged communities was similar to the overall experience levels.[35]

(ii) *Inadequate trained PIOs and First Appellate Authorities:* findings of the report show that only 55% of surveyed PIOs had received RTI training. During discussions with the PIOs and the ATIs, it was highlighted that the frequent transfers/ changes in the PIOs adds to the challenge. This place additional work-load on the training institutes entrusted with providing RTI training.

(iii) *Poor Record Management Practices and Obsolete Guidelines:* Ineffective record management systems and procedures to collect information from field offices lead to delays in processing RTI applications. As per section 4(1)(a) of the Act, a public authority needs "to maintain all its records duty catalogued and indexed in a manner and form which facilitates the right to Information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated.[36]

(iv) *Non- availability of basic infrastructure:* The implementation of RTI requires the PIOs to provide information to the applicant through photocopies, soft copies etc. While these facilities are considered to be easily available at a

---

31 *Ibid.*
32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*
36 *Ibid.*

district level, it is a challenge to get information from Block/ Panchayat level. PIOs highlight that the lack of infrastructure hampers the RTI implementation at the PA level.[37]

(v) *Lack of motivation among PIOs:* during the RTI workshops organised in the surveyed states, PIOs cited that there were no incentives for taking on the responsibility of a PIO; however penalties were imposed in cases of non-compliance. There is also a wide variance in the seniority levels of PIOs.[38]

(vi) *Ineffective implementation of section 4(1)(b):* the internal processes within the public authorities are not defined, so as to take care of the requirement of the relevant suo-motu clauses. Various departments and ministries of government of India have in the last one year posted the requirements specified under section 4(1)(b) on the website. However the status of the same in the state government departments and websites is significantly poor.

1.9.3. Issues Faced at Information Commissions

(i) *SIC Annual Reports:* during the survey it was also found that there is no centralized data base of RTI (at the State/Centre level) applicants. A centralised database of all RTI applicants with their information requests and responses from information providers would enable the information commission to publish more accurate numbers in the annual reports.[39]

(ii) *Perception of being lenient towards PIOs:* when the information which is not given within the stipulated time then if PIO as a person is not responsible, then it has to be a systemic failure within the public authority. However as highlighted in the next sub- section, the information commission does not possess adequate monitoring and review mechanism to track the failures of the Public Authorities in complying with the RTI Act.[40]

(iii) *Lack of monitoring and review mechanism:* there are inadequate processes and records available with the information commission to take such steps.[41]

(iv) *High level of pendency:* this is a grave situation, the pendency at the commission is a huge challenge. It is due to non optimal processes for disposing off appeals and complaints.[42]

(v) *Geographical spread of Information Commissions:* some of the state governments have set up regional offices of their state commissions at various places in the state which saves lot of time and expenses. The CIC which has jurisdiction over RTI appeals relating to central government Public Authorities spread across the country is located in Delhi which results in wastage of considerable time/ expenses of PIOs and the appellants, who come from far off areas.[43]

---

37 *Ibid.*
38 *Ibid.*
39 *Ibid.*
40 *Ibid.*
41 *Ibid.*
42 *Ibid.*
43 *Ibid.*

(vi) *Variation in assumptions of role by SIC and State Governments*: it was found during the survey that there is no clear division of responsibilities between the SICs and Nodal Department in terms of monitoring the implementation of RTI Act.[44]

1.9.4 Issues and Constraints Found in the Survey

While assessing the entire situation during the survey the following issues emerged:

(a) The Public Authorities have to enhance the level of ownership to ensure the RTI delivery happens as per the spirit of the Act. They have to be ultimately responsible for identifying the gaps in their offices in the delivery of the information, thereafter identify the resources needed and appropriately budget for it.[45]

(b) Maintenance of the information required to be furnished to the State Information Commission as per Section 25(3) the role of the Centre/State Government is to facilitate the Public Authorities in implementation of the Act. This can happen through providing support to Public Authorities for training, development of software applications, e-Training modules, generating awareness amongst citizens etc.[46]

(c) The role of the Information Commission has to go beyond the hearing of the appeals. As per the Act, they are expected to issue orders/directions to the Public Authorities to carry out their duties as per the mandate of the Act. However till the time Information Commission assumes the role of ensuring the compliance of the RTI Act by the various Public Authorities, there would not be any control mechanism. The State Government has to play a facilitative role to the Information Commission through issuance of supporting rules/orders to the Public Authorities.[47]

10. Conclusions

The effective implementation of RTI Act will not be possible until or unless the Governments and its Public Authorities realize that it is their sincere responsibility to serve their duty. All the agencies involved have to work efficiently and transparently. The infrastructure and resources are conducive for the successful working of RTI Act. The issues and constraints found in the survey have to be effectively dealt with to empower this right of common citizen. There are some suggestions for effective implementation of RTI Act 2005:

1. Increase the number of hearings per day to at least 18-20 Cases per day.
2. Improve the legal assistance available to the Information Commissioners because they are often found to be lacking in enough legal knowledge required.

---

44 *Ibid.*
45 *Ibid.*
46 *Ibid.*
47 *Ibid.*

3. Need for 'Judicial Clerks' to assist them in preparing and writing good decisions and orders.
4. The CIC has to increasingly turn to Information and Communication Technology (ICT) solutions in relation to its problems. Fortunately, there is already a healthy trend in this direction. Many of the offices are now using some computer-based programs to generate standard notices from a common database. As mentioned earlier, hearings are commonly held through audio / video conferencing. Urgent written submissions/correspondence sent over fax or e-mail is considered.
5. The RTI gateway should be made more friendly and easy for a common lay man.

   The RTI Act has been criticized on several grounds. It provides for information on demand, so to speak, but does not sufficiently stress information on matters related to food, water, environment and other survival needs that must be given pro-actively, or *suo moto*, by public authorities. The Act does not emphasize active intervention in educating people about their right to access information -- vital in a country with high levels of illiteracy and poverty or the promotion of a culture of openness within official structures. Without widespread education and awareness about the possibilities under the new Act, it could just remain on paper. The Act also reinforces the controlling role of the government official, who retains wide discretionary powers to withhold information.

The most scathing indictment of this Act has come from critics who focus on the sweeping exemptions it permits. Restrictions on information relating to security, foreign policy, defence, law enforcement and public safety are standard. But the Right to Information Act also excludes Cabinet papers, including records of the council of ministers, secretaries and other officials; this effectively shields the whole process of decision-making from mandatory disclosure.

Another stringent criticism of the Act is the recent amendment that was to be made allowing for file notings except those related to social and development projects to be exempted from the purview of the Act. File notings are very important when it comes to the policy making of the government. It is these notes that hold the rationale behind actions or the change in certain policy, why a certain contract is given or why a sanction was withheld to prosecute a corrupt official. Therefore the government's intention to exempt the file notings from the purview of the Act has come in for stringent criticisms.

In the end we can say that in enacting the Right to Information Act India has moved from an opaque and arbitrary system of government to the beginning of an era where there will be greater transparency and to a system where the citizen will be empowered and the true centre of power. Only by empowering the ordinary citizen can any nation progress towards greatness and by enacting the Right to Information Act 2005 India has taken a small but significant step towards that goal. The real Swaraj will come not by the acquisition of authority by a few but by the acquisition of capacity by all to resist authority when abused. Thus with the enactment of this Act India has taken a small step towards achieving real Swaraj.

HINDU SUCCESSION AMENDMENT ACT, 2005 : REPERCUSSION ON JOINT FAMILY SYSTEM

Dr. Parminder Kaur*

1.1 Introduction

In the historical development of humanity, in the proliferation of human civilization and in the social economy of the world, woman has always been considered as an important part as man. At the same time she has always been treated as an inferior creature as compared to their male counterparts. This inferior status of the woman exists not merely in their households and in the society but also in the matter of privileges and right.[1] It is so because our legal system also develops itself on the basis of prevailing norms of social sphere and these social norms and values put tremendous effect on the legal system. Thus the effect of social status and position of women shows its impact over conventions and laws of our society also.

Though this gender in equality facets itself in different forms, but the most tiresome one relates to the effective property rights of women. In India women's right to inherit, own and control property are determined primarily by the values and norms which are socially acceptable and the primary objective of inheritance systems in Indian society has been to preserve property, especially landed property, intact for male heirs.[2] Even our customs (excluding, of course matrilineal customary law) tend to limit women's property only up to the movable contents e.g. ornaments and clothing actually given to them at the time of marriage. Sometimes these customs allow them to inherit from very near relation like the father and mother or some time from the mother only otherwise it denies the right of inheritance to cognate kindred.[3]

2.1 Passing of Hindu Succession Act, 1956

After independence, in order to ameliorate and to enhance the women's economic position, the Hindu Succession Act, 1956 was passed. With the passing of this Act the rules of intestacy and testamentary succession prevailing under the existing system of Hindu Law (i.e. in Mitakshara and its schools generally it is consanguity and in Dayabhaga the guiding principle of religious efficacy) have been considerably altered. In the Act an entirely new line has been substituted, based on love and affection. The **important** features of the Act are as follows:

(1) Daughter is also included as a simultaneous heir along with son, widow, etc.

(2) The share of daughter in the property of the father is made equal to that of a son.

(3) Married and unmarried daughters are placed on the same footing and both are the heirs to the father's property equally along with the other heirs.

---

* Assistant Professor, Department of Laws, GNDU, Regional Campus, Gurdaspur.

1 Khan, H Nazeer, *Ambedkar on Gender Equality: Myth and Reality,* Deep and Deep Publications, New Delhi, 2007, p. 173.

2 J. Dancan. M. Derret, *A Critique of Modern Hindu Law*, N.M. Tripathi Bombay, (1970), p. 193.

3 *Ibid*, at p. 194.

(4) Under section 6 of the Act provision is made to provide a share to the daughter in Mitakshara coparcenary property of a Hindu male also.

(5) Certain relations, such as brothers and sisters, etc are grouped together for the purpose of simultaneous succession.

(6) Elimination of all widows of gotrajas from heirs specified in Class II of the Schedule except the father's widow and brother's widow.

(7) Providing the right of pre-emption.[4]

3.1 State Amendment Acts

Though Hindu Succession Act brought radical reforms in the property rights of woman, but still there are certain inherent loopholes under the Hindu Succession Act which still discriminate the females. To overcome these discriminations four states[5] introduced amendments in Hindu Succession Act, 1956 and these amendments were implemented by those states also.

The objectives for the amendment of the Act in these states are to provide equal rights and share to the daughters in the coparcenery property also. The exclusion of daughters from participating in coparcenary property ownership merely on the basis of sex is unfair. As per the law of four of these states (excluding Kerala), in a joint Hindu family governed by Mitakshara law, the daughter of coparcener shall by birth become a coparcener in her own right in the same manner like the son. Kerala, however, had gone one step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family. Thus Kerala has abolished the joint Hindu family system altogether including the Mitakshara, Marumakkattayam, Aliyasantana and Nambudri systems.

The approach of the Tamil Nadu, Maharashtra, Andhra Pradesh and Karnataka, State legislatures is remarkably different from that of Kerala. These four states instead of abolishing the right by birth in the joint family strengthened it, at the same time these States broadly remove the gender discrimination existed in the Mitakshara Coparcenary by making daughters also the coparceners and giving them same rights which is given to other coparceners. The broad features of the legislations in these States are more or less understood in the same language in each of these Acts. The amending Acts of Andhra Pradesh, Tamil Nadu and Maharashtra add three sections namely, 29A, 29B and 29C but Karnataka numbers them as Sections 6A, 6B and 6C of the Act in order to corporate the abovementioned aspects. By virtue of these Sections now the position of daughter in these four states is as under:

(a) The daughter of a coparcener in a joint Hindu Family governed by Mitakshara law shall become a coparcener by birth in her own right in the same manner as

---

4 T.P Gopalkrishanan, R.B. Sethi & C.Unikanta Menona, *Codified Hindu Law*, Law Book Company, Allahabad, (1959), p. 9.

5 i) *The Hindu Succession (Tamil Nadu Amendment) Act*, 1989.
ii) *The Hindu Succession (Maharashtra Amendment) Act*, 1994.
iii) *The Hindu Succession (Andhra Pradesh Amendment) Act*, 1986.
iv) *The Hindu Succession (Karnataka Amendment) Act*, 1994.

the son and have similar rights in the coparcenary property and be subject to similar liabilities and disabilities.

(b) On partition of a joint Hindu family's coparcenary property, she will be allotted a share equal to that of a son. The share of the predeceased son or a predeceased daughter on such partition would be allotted to the surviving children of such predeceased son or predeceased daughter, if alive at the time of the partition.

(c) This property shall be held by her with the incidents of coparcenary ownership and shall be regarded as property capable of being disposed off by her by will or other testamentary disposition.

(d) The state enactments are prospective in nature and do not apply to a daughter who is married prior to, or to a partition which has been effected before the commencement of the Act.

3.1.1 Kerala Model

The Kerala model is different from the model adopted by the above mentioned four states. The state of Kerala by accepting the recommendations of Hindu Law Committee headed by B.N. Rau (the committee which was given the responsibility of framing the Hindu Code Bill) has abolished the concept of coparcenary. The Kerala Joint Hindu Family System (Abolition) Act, 1975 (hereinafter known as the Kerala Act) in section 4(1) of the Act lays down that all the members of a Mitakshara Coprcenary will hold the property as tenants in common on the day the Act comes into force as if a partition had taken place and each holding his or her share separately. The notable feature of the Kerala law is that it has abolished the traditional Mitakshara coparcenary and the right by birth. But in Kerala, the Marumakkattayam, Aliyasantana and Nambudri systems[6] were also present, some of which were matrilineal joint families and these joint families were also abolished in Kerala along with the concept of Mitakshara coparcenery and right by birth.

4.1 Passing of the Hindu Succession (Amendment) Act, 2005

Before the passing of this amendment there is already three types of law exist in this area i.e. (i) the Hindu Succession Act, 1956 (ii) Kerala Model (iii) Andhra Model. This would result in non-adherence to the directive principles of state policy which require the state to take steps to secure a uniform civil code throughout the territory of India. Though, these states done a lot to implement the property rights of women, but having these different laws on these property matters, again it creates confusions in the society.

---

6 **Marumakkathayam** was a system of matrilineal inheritance prevalent in Kerala. Under the Marumakkathayam system of inheritance, descent and succession to the property was traced through females. The mother formed the stock of descent and kinship as well as the rights to the property was traced through females and not through males.
Aliyasantana (sister's son lineage) was a matrilineal system of inheritance practiced by the Bunts and other communities in the coastal districts of Karnataka. Marumakkathayam, in Malayalam, was a similar system which was practiced by Nairs and Thiyyas in the area known today as Kerala.
Nambudri was also similar type of inheritance prevalent in Madras and cochin states.

Accordingly, the need was felt to have Central law enacted by Parliament under Article 246 of the Constitution on the same subject. Considering this need and to remove the continuing inequalities existing under the Hindu Succession Act, the Law Commission of India prepared a draft of Hindu Succession (Amendment) Bill, in 2000. This Bill was embodied in the Hindu Succession (Amendment) Bill of 2004 which became the Hindu Succession (Amendment) Act, 2005. It was passed by both the Houses of Parliament in August, 2005 and came into force on 9th September 2005. This amendment introduced sweeping changes in the Hindu Succession Act, 1956. Though directly it is an amendment made under Hindu Succession Act but indirectly it put major effects on Hindu coparcenary, joint family and joint family property, and thus tries to remove discrimination against female which exist in these institutions. It follows Andhra model but at the same time tries to remove the loopholes which were still existed in these state amendments.

5.1 Effects of the Hindu Succession (Amendment) Act, 2005

The major change introduced by the Hindu Succession Amendment Act, is the substitution of new Section 6 which is as under:

5.1.1 Daughter included into Coparcenary

Section 6(1) makes the daughter of a coparcener as a coparcener by birth in her own right in the same manner as son and has same rights and liabilities as that of a son. Further any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

According to this provision, the discrimination against daughter has been brought to an end, as her rights and liabilities are the same as that of a son. This also means that a daughter is now capable of acquiring an interest in the coparcenary property, demand a partition of the same, and dispose it of through a testamentary disposition. Further, daughters would not only be empowered to form a coparcenary along with their other siblings (irrespective of gender), but would also be competent to start a joint family herself. She can even be a karta, through herself acquired earning into the joint family fund, something that was not possible before the amendment. In other words, all the prerogatives and uniqueness of a son's position in the family is available to a daughter as well.

In order to explain this provision in simple terms lets have a look at the following example. Suppose P has two children one son S and one daughter D. Now after amendment coparcenary consist of P, S and D. Suppose son SS is born to S he will also become coparcener. Further if great grandson is born to P i.e. SSS he will also become a coparcener. Similarly daughter of S is also a coparcener. On the other hand along with daughter D her children's whether son DS or daughter DD will also become a coparcener.

But at the same time, this interpretation would make them members of two coparcenaries, one belonging to their father and one belonging to their mother. Thus the fear is that this new law would give rise to numerous litigations if this liberal interpretation shall be given to the word 'Daughter of coparcener shall be a

Coparcener' so to avoid this litigation there is need to enact correct and proper law.[7] A coparcenary, in its classical exposition, represents 'a community of interest and unity of possession'. In it, the interest of one is the interest of all, and the possession of one is the possession of all. The proximity of Hindu joint family is organized and maintained on the patriarchal principle in which the daughters on their marriage cease to be member of their parents' family. By making the daughter by birth a coparcener for all intents and purposes, are we envisaging the creation of a new joint family unit in which the husbands of their daughter (along with other kindred) will also be an integral part? Alternatively the daughter is deemed to be a coparcener only for the purpose of equal apportionment of patrimony? Obviously, the latter view is intended, and for achieving this objective, we need not continue to cling to the concept of coparcenary, it is likely to create confusion.[8]

5.1.2 Holding the Property as per Incidents of Coparcenary Ownership

According to Section 6 (2), a female would hold the property with incidents of coparcenary ownership. The legislature has not explained nor provided anywhere as to what these incidents of coparcenary ownership are. Thus the natural step would be to seek their explanation under the classical law under which there are two basic incidents of coparcenary ownership. First, that each coparcener holds the property with the incidents of unity of possession and communities of interest, i.e., all coparceners jointly have the title to the property and joint possession of the property. Till the time a partition takes place, no one can predict what his share is. Secondly, all coparceners hold the property with incidents of doctrine of survivorship, ie, on the death of one coparcener, his interest in the coparcenary property is taken by the surviving coparceners and not by his heirs. Does this mean that the doctrine of survivorship would apply in case of female coparceners and not male coparceners, as the legislature expressly provides, that the female coparceners would hold the property with incidents of coparcenary, survivorship being one of such basic incident, or does it mean that if the legislature has abolished the application of doctrine of survivorship for male coparceners, and female coparceners would hold the property and they share exactly in the same manner as the males, it stands abolished for them too? By the abolition of the doctrine of survivorship in the case of male coparceners by an express provision, the legislature has created confusion. It is fundamental rule in laws relating to inheritance and succession that the term 'his' does not include 'her'. This must have been the reason why the legislature amended s 30 of the Act to add 'her' after 'him'. The use of the term 'his' interest and not 'his or her' as has been used in s 30, clearly suggests that it is only in case of an undivided male Hindu dying that doctrine of survivorship would not apply and if a female coparcener dies, the doctrine of survivorship may apply.

Besides, explanation to Section 6(3) states: For the purpose of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the

---

7 Bhajan Kaur, "*The Hindu Succession (Amendment) Act,* 2005: An Appraisal", *Panjab University Law Review*, Vol. 47, (2005-06), p. 67.

8 Virendra Kumar, "The Hindu Succession Act: Ending Gender Bias", *The Sunday Tribune*, April 9, 2006, p. 12.

property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. Even assuming that any reference to a Mitakshara coparcener includes a reference to a daughter of a coparcener, the use of term his, him throughout leads to a confusion that has been created by the legislature. It appears that the doctrine of survivorship has been abolished for male coparceners but has been retained for females.

Further by Section 6(2) a distinction has been created between female members of joint family in the relation to their rights over the joint family property. The two classes of females are one, who are born in family and secondly, those who become members of this joint family by marriage to the coparceners. Females, who are born in the family i.e., daughters, sisters posses a right by birth in the coparcenary property and those who become members of this joint family by marriage to the coparcener, are subject to the same law as it stood before the amendment. Their rights over the joint family property continue to be the same, like maintenance out of its funds, a right of residence in the family house, etc.[9]

5.1.3 Abolition of Doctrine of Survivorship

Under Section 6(3) of the amending Act, 2005 doctrine of survivorship was altogether abolished. Doctrine of survivorship was one of the important incidents of coparcenary. As per this doctrine, if Mitakshara coparcener dies leaving behind his undivided interest in the Mitakshara coparcenary property, his interest will devolve on other surviving coparceners. That why in Mitakshara coparcenary intrest of coparceners was always fluctuating? It increases with death of other coparceners and decreases with birth of coparceners in the family.

Though this doctrine was first modified by Hindu Women's Right to Property Act, 1937 when coparcener's widow was entitled to hold the interest of her deceased husband during her life time as a limited owner, and after her death it passes to other surviving collaterals. When Hindu Succession Act, 1956 was passed this doctrine was again modified by the provisions of section 6 of the Act. Now under the amending Act, 2005 this doctrine by virtue of provisions of section 6(3) was abolished.

Through the abolition of this doctrine various confusions have also been created. For example, a Hindu family comprises of a father F, and two sons S 1 and S 2, who form an undivided coparcenary. Each of them would have a one-third share in the joint family property. Then, S 2 dies as a member of this undivided coparcenary. Under the old law, on the death of S 2, the surviving coparceners would have taken the share of S 2 by survivorship and their share would have increased to a half each. Thus, both F and S 1 would have been entitled to one half of the property on the death of S 2.

After the amendment, and with the abolishing of doctrine of survivorship, the share of S 2 would be calculated after affecting a notional partition, and that would come to

[9] Poonam Pradhan Saxena, *Family Law Lectures*, Family Law II, Lexis Nexis, Butterworths, (2007), pp. 345-46.

one-third. This one-third would not go by doctrine of survivorship and would go by testamentary or intestate succession as the case may be. If there is no Will, then this one-third would go according to the Hindu Succession Act, as per which as between the father and the brother, the father will be preferred and the brother will be excluded from inheritance in this presence. Therefore the father will get two-third of the total property and the brother would take one-third.

Thus, abolition of doctrine of survivorship creates unequal rights between surviving coparcener's vis-à-vis each other, which is contrary to the basic concept of coparcenary. Here, no purpose seems to be served by the abolition of this doctrine. It would be noted that with the retention of survivorship, the legislature in 1955, had not distorted the concept and incidents of coparcenary and at the same time had not given the females an unfair deal. This doctrine was applicable only when none of the class 1 female heirs was present. The presence of even one of them would have altered the mode of devolution of property- from survivorship to intestate or testamentary succession, as the case may be. Now with the abolition of this doctrine the newly introduced inequality may be disadvantageous to the family members.[10]

The amendment retains the concept of notional partition but modified its application. Prior to this amendment, notional partition was effected only if the undivided male coparcener had died leaving behind any of the eight class1 female heirs or the son of a predeceased daughter and did not apply generally in every case of death of a male coparcener. The present amendment makes application of notional partition in all cases of intestacies.

While affecting this notional partition the present Act provides in detail the calculation of shares under section 6(3). It provides:

(a) the daughter is allotted the same share as is allotted to the son;

(b) the share of the predeceased son or a predeceased daughter as, as they would have got had they been alive at he time of partition, shall be allotted to the surviving child of such predeceased son or such predeceased daughter;

(c) the share of the predeceased child of a predeceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of partition, shall be allotted to him as if a partition has taken place immediately before this death, irrespective of whether he was entitled to claim partition or not.

At present, if a minor child dies, irrespective of the sex, his or her share would be calculated after effecting notional partition and such share would go by intestate or testamentary succession, as the case may be. Thus under section 6(3) notional partition has been affected in case of the coparcenary property but another striking question is that after the amendment where is the coparcenary? Where is the coparcenary property?

---

10 *Ibid,* at p. 342.

Under the old law there was a process to create a Mitakshara coparcenary by birth and to constitute Mitakshara coparcenary property by inheritance as property inherited from Father, Father's Father, Father' s Father's Father. But Supreme Court through its judgment *CWT v. Chander Sen*,[11] has already made it clear that the property inherited under the Hindu Succession Act 1956, is the separate property of a person who inherited it. Similarly, in the case of *Hardeo Rai v. Sakuntala Devi and others*,[12] it was held that when an intention is expressed to partition the coparcenary property, the share of each of coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. Parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common". After taking a definite share in the property, a coparcener becomes owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

Even before these decisions, way back in 1978 when *Gurupad v. Hirabai*,[13] was decided by the Supreme Court then also Supreme Court tries to give to the notional partition, the effect of real partition. In this judgment it is clearly mentioned that in order to determine the extent of deceased share. Explanation 1 to section 6 resorts to the simple expedient, undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death? The assumption once made, is irrevocable. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained. On the basis, that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

So, by this judgment the notional partition will be treated as real partition for all intents and purposes. It means that joint family will automatically comes to an end and so the joint family property because in *CWT v. Chander Sen*,[14] Supreme Court categorically mentions the character of the property, i.e., the property inherited by the

[11] AIR 1986 SC 1753.
[12] (2008) 7 SCC 46.
[13] AIR 1978 SC 1239.
[14] AIR 1986 SC 1753.

son from his father under section 8 of the Hindu Succession Act would be the separate property qua his own sons because now by virtue of this section new list of heirs is created. Further, section 19 of the Act also provides for the mode of succession of two or more heirs and they shall take the property as tenants-in-common and not as joint tenants. The result of this rule is that the heirs will no longer inherit the property as ancestral property as joint tenants. But when ever the partition took place, they will inherit the property as tenants-in-common.

Thus, Supreme Court's observation through its judgments put the survival of Mitakshara coparcenary property on death knell. But the judgments would not stop the people from litigation unless the law makes it clear whether such property is a separate property or a Mitakshara coparcenary property. It is unfortunate, on the one hand, law have tried to give equal right to the daughter in this centuries old system of common ownership of property under Hindu law, and on the other hand without any law by the Parliament, and by the judgment of supreme Court the spontaneous channel to provide property for this common ownership has already been blocked. In reality this amendment has opened a channel for litigation, ambiguities, and anomalies only, without giving anything in reality to the daughter. Had the parliament been intended to give the equal right to the women they should have abolished the institution of coparcenary as it has been done in the state of Kerala.[15]

5.1.4 Abolition of Doctrine of Son's Pious Obligation

It abolishes pious obligation of son to pay the debts of father One of the features of classical Hindu law that imposed upon a son, grandson or great-grandson the liability to pay their father's debts, has been abrogated by the present amendment. The emphasis to pay the father's debts was so strong that if the son had to pay his and his father's debts, it was provided that he should pay his father's debts first to free him from leading life of bondage in the next life. . Regarding the origin of this doctrine Supreme Court in the case of *Sideshwar Mukherjee v. Bhubneshwar Prasad Narain Singh*,[16] said that this doctrine is well known, has its origin in the conception of Smriti writers who regards nonpayment of debt as a positive sin. This aspect of the doctrine is religious in nature and it is not based for the benefit of creditors or of the protection of third parties. It is based on pious obligation of the sons to see their father's debt must be paid.[17] But along with this doctrine has another aspect also which is based on the logical corollary to the doctrine of the son's birth right in the ancestral property. As rights and duties are always correlated with each other, so under the Mitakshara Law if the sons are given birth right in the property, it is their duty also to repay the debt of their father. The Amendment Act does not abolish son's birth right in the property but it also recognizes daughter's right in the ancestral property. Therefore, logically both the children i.e. son and the daughter should be brought under this obligations because justice demand that rights and duties should go hand in hand.[18]

---

15 *Supra* note 7 at p. 69.
16 AIR 1953 SC 487.
17 *Satnarain v. Sri Krishan Das*, AIR 1936 PC 277.
18 B.M. Gandhi, *Hindu Law*, Eastern Book Company, Lucknow, 2008, p. 129.

6.1 Conclusion

The repercussions which are created by the Amending Act of 2005 are only because of the retention of the concept of Mitakshara coparcenary. The amendment considerably alters the concept of the Mitakshara Joint Hindu family and coparcenary by elevating a daughter to the position of a coparcener. Once a daughter becomes a coparcener, she naturally continues to be a member of her natal Joint family, even after her marriage. Even in the Parliamentary debates, at the time of passing of Hindu Succession Bill, the views were expressed that " To retain the Mitakshara Joint family and at the same time putting a daughter on the same footing as a son with respect to the right by birth, right of survivorship and the right to claim partition at any time, will be to provide for a Joint family unknown to the law and unworkable in practice."[19]

Thus, to resolve all the confusions, it is better to abolish the concept of coparcenary and to adopt the Kerala model. The main objective behind making the daughter as a coparcener is only to provide equal rights to the daughter in the division of her paternal property. For achieving this objective, there is no need to stick to the concept of coparcenary. Further, after the amendment, question is that where is the coparcenary? Where is the coparcenary property? Because, after the decision of the Supreme Court in CWT vs. Chander Sen, it has already made it clear that the property inherited under the Hindu Succession Act, is the separate property of the person who inherit it and under 6(3) of the Act, it is provided that the interest of the Hindu in the Joint Hindu family property shall devolve by testamentary or intestate succession under this Act and not by survivorship. Thus, the spontaneous channel to create the coparcenary property is already blocked, where the daughter should claim the equal share along with the son. Thus, in reality, the retention of Mitakshara coparcenary would only lead to ambiguities, anomalies and litigation. So, it is suggested that Mitakshara coparcenary should be abolished on the pattern of Kerala Model.

[19] Lok Sabha Debates, pp. 8014, 1955.

NEED OF INTERNATIONAL COMPETITION AGREEMENT IN THE AGE OF WTO

Mohammad Atif Khan*
Annpurna Sinha **

In 1994 with the conclusion of the Uruguay Round of GATT Multilateral Negotiations; the World Trade Organization (WTO) came into existence which liberalized International Trade. In the case of Competition Law its territorial approach has created difficulties in increasingly Globalized world. Although, Competition Law has provision regarding extraterritorial jurisdiction but the basic regulatory framework is provided to maintain competition in the own national market.

This paper is an attempt to show that there is a strong need of International Competition agreement in this increasingly Globalized world, to reduce the friction between different territorial jurisdictions. The Research methodology adopted for this paper is descriptive in nature. **Section I** introduces the concept of Liberalization of International Trade under the WTO and globalization of Competition. **Section II** deals with Development of Cross border Business transactions and the problem with territorial application of Competition Regulation. **Section III** deals with Extraterritorial feature of Competition Law and conflict between different jurisdictions. This paper will conclude that there is a strong need of International Competition Agreement in the age of WTO to avoid the conflict of different jurisdictions to Liberalized International Trade.

1.1 Introduction

Thousands Year back business activity operates in different states but the world that time was not as integrated as present. In present time business activity operates in highly economically integrated world but different countries still remains legally, politically and culturally diverse. The globalization of the world economy on the one side and the expansion of national systems of Competition Law (Antitrust law as known in United States) on the other side over the last few years have raised to the top of the international agenda the trade and competition issue.[1] As we know that the present age is the age of globalization but law and policies is still structured on the national basis to procure its citizen's welfare. It is obvious too as different countries are having different social, political and cultural values which would be shown into law and policy of respective country. The globalization of the world economy has been driven by the *General Agreement on Tariffs and Trade* (GATT) from 1947 to 1994, through eight negotiations rounds which have progressively lowered down tariffs and increased the volume of trade in goods and services.[2]

---

* Assistant Professor at Amity Law School, Lucknow.
** Assistant Professor at Amity Law School, Lucknow.

1 E.U. Petersmann, "International Competition Rules for Governments and for Private Business", 30:3 J. *World Trade* 5 (1996).

2 On the GATT, see J.H. Jackson, World Trade and Law of The GATT (1969).

The objective of Competition Law is to promote and sustain competition in market by regulating anti-competitive conduct. Although Competition Law has extraterritorial jurisdiction but the basic operation is focused on the domestic regulation of anti-competitive conduct. The extraterritoriality of the different Competition Law jurisdiction has created the problem of jurisdictional conflict in the present globalized world. Therefore there is a felt need of International Competition Agreement to reduce the jurisdictional conflict of different countries which would definitely result into consequential integration of world markets.

In 1994, the *World Trade Organization* (WTO) was created with the aim of driving and regulating the constant increase of trade at a global level and the consequential integration of world markets.[3] Therefore National economies are more open to foreign competition and foreign direct investments. Most of the firms traditionally operating at a national level now adopt global strategies. While trade barriers are lowered in the age of WTO and business started beyond the national territory, anti-competitive practices also increased. Such practices which may reduce effective competition and undermine the benefits of globalization, dramatically reveal the limits of a non-synchronized international antitrust regime.[4]

Most of the countries are having its own national Competition Law but at the same time it is very difficult to impose its extraterritorial jurisdiction on other countries. In the absence of international cooperation, it is unlikely for antitrust authorities to be able to seek in foreign territory the information necessary to establish infringements.[5] As a result of lack of international agreement on Competition Law companies may be subject to different nation's Competition Laws which would result into jurisdictional friction.

Various attempts to synchronizing competition principles with a newly liberalized trading system by establishing a harmonized international antitrust regime have dramatically failed.[6] In 1994 with the conclusion of the Uruguay Round of GATT Multilateral Negotiations; the World Trade Organization (WTO) came into existence which liberalized International Trade. In the Agreement which established WTO there are various ranges of limited provisions which addresses the Competition Law issues under WTO on sector specific basis but still there is no International Competition Agreement.[7] Hence there is a need of an International Competition Agreement which is also contemplated in WTO Ministerial Conference in Doha (2001) and Cancun (2003).

---

3 On the WTO, *see* generally J.H. Jackson, "The Uruguay Round", *World Trade Organization and The Problem of Regulating International Economic Bahaviour* (1995).

4 M.H. Hauser & E.U. Petersmann, *International Competition Rules in the GATT/WTO System*, SWISS REV. INT'L ECON. REL. 169 (1994).

5 European Commission (DGIV-Competition), Report of the Group of Experts, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules, July 1995, available on Internet at the *http://europa.eu.int/en/comm/dg04/interna/.*

6 C.J. Cheng, *International Harmonization of Antitrust Laws* (1995).

7 Andrew T. Guzman, "Is International Antitrust Possible?", 73 N.Y.U. L. Rev. 1501 (1998).

1.2 The Concept of Liberalization and Globalisation of International Trade Under the WTO and Globalization of Competition

Over the last four decades the world has witnessed a great economic integration. During the 1970s and 1980s the spread of economic activity beyond the national boundaries was termed as '*Internationalization*'.[8] According to the OECD (Organization for Economic Co-operation and Development) the term internationalization has proved too limited which can be replaced with a new phenomenon Globalization which is more advanced and complex form of internationalization which implies a degree of functional integration between internationally dispersed economic activities.[9]

The term Globalization can be adopted to describe the process of realizing a borderless global economy in which firms engage in international commerce with little regard to national frontiers.[10] OECD subsequently explained this concept in 1996 in the terms as: *"An Economic phenomenon, globalization is manifested in a shift from a world of distinct national economies to a global economy in which production is internationalized and financial capital flows freely between countries"*.[11]

In general Globalization can be commonly attributed to the increasing organization and integration of the economic activity on the international basis. The concept of Globalization recognizes that firms are increasingly organizing their business activities on an international basis to realize global scale efficiencies.[12] Two decades back in 1990s the world also witnessed the starting of liberalization for the world trade to promote the free trade and to relax the government restrictions.

In 1994 with the conclusion of the Uruguay Round of GATT Multilateral Negotiations; the World Trade Organization (WTO) came into existence which liberalized International Trade at the world level.[13] After the establishment of WTO world trade increased tremendously as now we have a forum under WTO regime for the liberalization of international trade. Many countries nowadays, particularly those in the third world, arguably have no choice but to also "liberalize" their economies in order to remain competitive in attracting and retaining both their domestic and foreign investments. Global foreign direct investment (FDI) flows exceeded the pre-crisis average in 2011, reaching $1.5 trillion despite turmoil in the global economy.[14]

In this WTO regime where international trade is liberalized, this globalization inherently recognizes rivalry between firms of different countries which put forth the

---

8 P. Dicken, *Global Shift: The Internationalization of Economic Activity.* The Guilford Press, New York, (1992).

9 OECD, '*Globalization and Local and Regional Co-operation*', Working Paper No. 16, OECD, Paris, (1994), p. 7.

10 T. Levitt, *The Globalization of Markets,* OUP, New York, 1985.

11 OECD, *Globalization: What Opportunity and Challenges for Governments* OECD, Paris, 1996.

12 Martyn D. Taylor, *International Competition Law*, Cambridge University Press, 2006, p. 36.

13 *Supra* note No. 4.

14 UNCTAD, World Investment Report 2012, Available at *http://unctad.org/en/Pages/ DIAE/World %20Investment%20Report/WIR2012_WebFlyer.aspx.*

competition in market at international level.[15] In such a globalized market competition in the firm also goes beyond the territory of countries. Most of the countries are having efficient national competition law regimes lack appropriate instruments to efficiently investigate and enforce their decisions against multijurisdictional competition violations. In the absence of international cooperation, it is unlikely for competition authorities to be able to seek in foreign territory the information necessary to establish infringements.[16]

1.3 Development of Cross Border Business Transactions and the Problem with Territorial Application of Competition Regulation

Globalization has had a profound influence on international trade and commerce with both beneficial and detrimental effects.[17] In a globalized international market, firms or companies have to adopt a business strategy that can respond to greater international competition. Hence we can understand that globalization promoted the diversity and volume of cross border business activity which also promoted the international competition.

In the present era of globalization and liberalization international trade activity has been changed and different cross border business activities are adopted by the different countries firm i.e. Inter firm business activity, Intra Firm business activity etc.[18] This would result into international competition issue and jurisdictional friction between different countries. As we know that competition law basically drafted to protect its citizen. Hence we can assume that generally it does not much care about foreign firms as compared to its National firms.

As we also know that different competition law also has the extraterritorial jurisdiction approach. Although they have such provision to control over the Anti-competitive conduct done beyond the particular territory, those provisions lack appropriate instruments to efficiently investigate and enforce their decisions against multijurisdictional competition violations.[19] In such a situation the question is that present National Competition Law is sufficient for the International Trade activity or in the present globalized era there is a strong need of International competition Agreement under a forum like WTO to avoid the Anti-competitive conduct at international level in which International trade would flourish profoundly.

When countries indulge themselves into Inter Firm trade activities through traditional export import trade approach their trade relational generally governed by contract law and investment and trade law.[20] In such a trade relation domestic competition law basically on the territorial basis and it is not much effective in regulating foreign

15 *Supra* note No. 13, at p. 36.

16 European Commission, Communication to the Council, *Towards an International Framework of Competition Rules*, COM (96) 284, 18 June 1996, available on Internet at *http://europa.eu.int/en/comm/dg04/interna/.*

17 *Supra* note No. 13, at p. 36.

18 Discussion in D.J. Gerber, 'Antitrust and the Challenge of Internationalization' (1983) 64(3) *Chicago Kent Law Review*, p. 689.

19 *Supra* note No. 6.

20 *Supra* note No. 13, at p. 38.

firms or companies. In this situation countries are not much active to take action against anti-competitive conduct in their own territory unless that conduct does not adversely affect the competition in their own market.[21]

Another form of the international trade is Intra Firm trade activities when a foreign firm or company establishes its subsidiary in other country and trade with a firm or company of that other country.[22] Companies also acquire stake into other firms and companies situated into other jurisdiction to expand rapidly into new geographic markets.[23] In present globalized market companies are intensively willing to increase their profit and market power which would result into entire new international competition and cannot be governed or controlled by the domestic competition law.[24]

With above discussion it is clear that in the globalized and liberalized world it is very difficult to regulate the International Anti-competitive activity by domestic competition law even to enforce its extraterritorial provision to the fullest.[25] Therefore the International competition agreement is the need of present globalized world to promote competition at international level which would protect consumer welfare at international level. It can be that, given its very broad membership and its growing political importance at a global level, the WTO appears nowadays to constitute the better suited forum to try and develop some forms of multilateral antitrust cooperation.[26]

1.4 Extraterritorial Feature of Competition Law and Conflict Between Different Jurisdictions

Above discussion identifies the difficulties in the territorial approach of competition law to regulate competition in the globalized world market and although competition law has extraterritorial approach in few jurisdiction, it is also not very effectively implemented due to territorial friction between different jurisdiction. Here we can also take the justification for the international competition agreement under economic approach as insufficient regulation i.e. under regulation and excessive regulation i.e. over regulation.[27]

---

21 Andrew T. Guzman, '*International Antitrust And The Wto: The Lesson From Intellectual Property*' Working Paper 2000 – 20, U.C. *Berkeley Law and Economics Working Paper Series*, School of Law, Boalt Hall, p. 16.

22 *Supra* note No. 13, at p. 40.

23 P.M. Mehta, 'Foreign Direct Investment, Mega Mergers and Strategic Alliances: Is Global Competition Accelerating Development or Headings Towards World Monopolies?', Paper at pre-UNCTAD X Seminar on the Role of Competition Policy for Development in World Globalizing Markets, Geneva, July 1999.

24 *Supra* note No. 22, at p. 16.

25 R.P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1 (1992).

26 C. Cocuzza and M. Montini, *International Antitrust Cooperation in a Global Economy;* E. Fox and J.A. Ordover, "The Harmonization of Competition and Trade Law: the Case for Modest Linkages of law and Limits to Parochial State Action", *19:2 World Competition Journal of Law and Economics 5 (1995).*

27 *Supra* note 21, at p. 359.

Under regulation occurs either where the coverage of the domestic competition law is incomplete so the anti-competitive conduct is not regulated or the anti-competitive conduct is regulated but the level of the regulation is below the globally optimal level.[28] As we know that nations formulated its competition law with a national welfare perspective without considering the full impact of its law on welfare of foreign nation or international community. If a country pursue the enforcement of its competition law with national self-interest it would permit such anti-competitive agreement which does not have adverse effect on its domestic market irrespective it would affect other nation's market adversely.[29] An example of under regulation is export cartel leading to increased price paid by foreign consumers.

Conversely Over-regulation occurs where one or more competition laws impose a level of regulation above the globally optimal level, including in circumstances where the domestic competition laws of different jurisdictions overlap.[30] In such situation if a country pursue the enforcement of its competition law with national self-interest it would prevent such anti-competitive agreement which does have adverse effect on its domestic market irrespective it would beneficial for other nation's market.[31] This over regulation in the context of extraterritorial application of domestic competition law may lead to jurisdictional friction between different countries.[32] A number of significant transactions in recent years clearly illustrate the potential for system friction to arise as a result of over regulation as Boeing/ McDonnel Douglas merger in 1997, GE/Honeywell merger in 2001 and MCI/Worldcom merger in 1999.[33] In all given three examples the relevant merger involved entities domiciled in the US and merging under US domestic Law but subsidiary of the merging entities had sufficient sales in markets in European Union (EU) to trigger the application of the EU merger law on the an extraterritorial basis.[34] In all three cases US Antitrust authorities approved the mergers but the Competition DG of European Commission (EC) threatened significant adverse regulatory measures if its concerns were not addressed.[35]

With above discussion on trans-border merger activity and the extraterritorial application of domestic competition law we can infer that it is very difficult to procure competition in international market in the present globalized era. Hence International antitrust issues have become important in current debates regarding international trade and international regulation.[36] The main question about

---

28 *Supra* note No. 13, at p. 45.

29 See, Andrew Guzman, "The Case for International Antitrust" also available on *http://ssrn.com/abstract=412300.*

30 *Supra* note No. 13, at p. 47.

31 *Supra* note No. 30, at p. 13.

32 P. Torremans, *Extraterritorial Application of EC and US Competition Law,* EU.L. Rev. 280, (1996).

33 UNCTAD, 'Competition Cases Involving More Than One Country', UNCTAD Paper, TD/B/COM.2/CLP/9, Geneva, 7 June 1999.

34 EU merger laws are based on the Control of Concentrations Between Undertakings Regulation, Council Regulation 139/2004, OJ 2004 No. L24.

35 E.M. Fox, *'Lesson From Boeing: A Modest Proposal To Keep Politics Out of Antitrust'* Antitrust Report, 19 November 1997.

36 *Supra* note No. 22, at p. 1.

international antitrust is that what would be the appropriate forum for negotiations? Whether it can be WTO or bilateral agreements between the countries would be fruitful.

In fact, the international competition issue has been on the political agenda of the WTO since the establishment of the Organization was still under negotiation. In 1993, in the framework of the negotiation for the creation of the MTO, then WTO, a Working Group of experts at the Max Planck Institute proposed a *Draft International Antitrust Code.*[37] The Draft Code envisaged the creation of an international competition law regime, based on minimum standard substantive provisions and on the establishment of a centralized enforcement and dispute settlement structure.[38] The too ambitious nature of the *Draft Code* was probably the main reason of its scarce success, but it remains a useful document for discussion on international antitrust law.[39] A later attempt to establish an international framework of competition rules at international level in the framework of the WTO was made at the *1996 First Ministerial Conference of the Parties to the WTO* The issue had been promoted before the Singapore Meeting by various parties to the WTO, among which the EC played a major role.[40]

The growing interest in international antitrust results from the increased importance of international trade and the dramatic fall in international tariffs over the last sixty years. The success of the General Agreement on Tariffs and Trade (GATT) now the World Trade Organization (WTO) in reducing tariffs has shifted the focus of trade discussions to non-tariff barriers which have become a more significant impediment to world trade as tariffs have fallen.[41] In the present globalized world it is not possible to control over the Anti-competitive conduct with the domestic competition law or any bilateral agreement between countries.

As we know for many years, international IP issues were negotiated within the *World Intellectual Property Organization* (WIPO), which deals exclusively with IP issues and for many years WIPO failed to produce a substantial international agreement on IP.[42] In the form of the *Trade Related Aspects of Intellectual Property* (TRIPs) agreement certain measure of cooperation has been achieved in the area of international intellectual property (IP) under WTO regime.[43]

---

37 Draft International Antitrust Code as a GATT-MTO Plurilateral Trade Agreement (Munich, Max Planck Institute, 1993), 65 BNA Antitrust and Trade Regulation Report 1628 (1993) (Special Supp.); (*see* note 1 above); E. FOX, *Toward World Antitrust And Market Access*, (*see* note 1 above).

38 E.U. Petersmann, *International Competition Rules for Governments and for Private Business.*

39 Massimiliano Montini, "Globalization And International Antitrust Cooperation", International Conference Trade And Competition In The WTO And Beyond Venice, December 4th-5th, 1998, p. 13.

40 *See* European Commission, Communication to the Council, "Towards an International Framework of Competition Rules", COM (96) 284, 18 June 1996, available on Internet at the *WWW site http://europa.eu.int/en/comm/dg04/interna/.*

41 *Supra* note No. 22, at p. 2.

42 There have been significant agreements dealing with international IP prior to TRIPs, of course. The two most prominent is the Paris Convention of 1883, see *supra* note 26, and the Berne Convention of 1886.

43 *Supra* note No. 22, at p. 2.

In fact, the lessons from IP are especially powerful because IP and competition law have very similar strategic implications for countries' domestic laws and negotiating positions. During the Uruguay Round, IP was included among the topics to be discussed. A few years later, the TRIPs agreement was reached, and the world had a substantive agreement covering international IP. The failure of WIPO and success of TRIPs offers a warning against efforts to negotiate an international competition agreement outside of the WTO framework, and a demonstration of the potential benefits of inclusion within the WTO.[44]

1.5 Conclusion

In conclusion we can say that competition law inherently has a territorial approach in its application. Although it has extraterritorial application but it is inefficient to regulate the Anti-competitive activity and to procure the competition in present globalized world which is highly economically integrated in the present age of WTO. The domestic welfare approach is beneficial for the national development but the under regulation or over regulation is not beneficial for the world economy. Its extraterritorial approach also creates the jurisdictional friction between countries which would result into political clashes in the globalized world. The world has been witnessed of system friction in Boeing/McDonnel Douglas merger in 1997, GE/Honeywell merger in 2001 and MCI/Worldcom merger in 1999.

Each nation wants to apply its competition law in such a manner to improve its national self-interest but countries neglect the world welfare which can be procured by the competition in international market. Hence we found a strong need of international competition agreement under an international forum to regulate Anti-competitive conduct at international level. If the negotiations are held within the WTO, such an agreement remains a potential outcome. If they are held in a stand-alone forum, an agreement is highly unlikely. Finally I would like to conclude that support for a WTO solution to international competition agreement must not be mistaken for a rejection of other approaches.

[44] Andrew T. Guzman, 'International Antitrust And The WTO: The Lesson From Intellectual Property' Working Paper 2000 – 20, U.C. Berkeley Law and Economics Working Paper Series, School of Law, Boalt Hall, at p. 3.

SCOPE, POTENTIALITY AND POSSIBILITY OF EMERGING CLIMATE CHANGE LITIGATION : AN OVERVIEWS WITH SPECIAL REFERENCE TO INDIAN SCENARIO

Chandreshwari Minhas*

1.1 Introduction

Certain societies and jurisdiction are regarded as being more litigious than others. Whilst difference in "litigation culture" contribute to this to some degree, essentially it is recognised that certain legal systems and their respective judicial infrastructures lend themselves to class actions and organised civil suits, whereas other jurisdictions (with normal legal systems) are less geared towards the use of litigation for seeking the same kind of redress.[1] Addressing climate change impact is in some countries led by individuals, public interest groups and others by lobbying to influence the policy and legislative change in order to achieve reform. In other countries, litigation is more commonly used as a tool for reform to influence climate change policy. In these countries the objective of climate change litigation from the point of view of the plaintiff environmentalist probably have less to do with actually asking the Courts to formulate climate change policy of itself, and more to do with seeking to attract public attention through the commencement of Court's proceedings, in order to increase pressure on governments to respond and implement suitable policies and legislation addressing global warming.[2]

2.1 Meaning and Objective of Climate Change Litigation

The US governments decision not to ratify the Kyoto Protocol to the UNFCCC and the perceived reluctance of the US congress to act on climate change has sparked frustration within civil society[3] and has led to the first major wave of climate change litigation.[4] However, climate change litigation is a global matter, with claims also being brought in differing forms in Europe, Africa and Australasia largely in response to a perception that the governments are not doing enough to deal with climate change. Accordingly, while this state of affair exists, the potential for many more claims worldwide arising out of damage to properties and communities as a result of floods, severe and catastrophic weather events, and climate change generally is significant.[5]

There is no one convenient definition that encapsulates the meaning of "climate change litigation". However, broadly speaking, on the basis of the emerging global

---

* Assistant Professor, School of Law, Raffles University (Rajasthan).

1 Jose A. Cofre et. al., "Climate Change Litigation" in Paul Q Watchman (ed.), *Climate Change: A Guide to Carbon Law and Practice,* 229-261 at p. 229 (2008).

2 *Ibid.*

3 Richard Dhal, "A Changing Climate of Litigation" *Environmental Health Perspective*, 115(4), 205 (April, 2007).

4 Maiden and EM McLaughlin, "Climate Change Litigation: Trends and Development", *Daily Environment Report,* Vol. 10, No. 63, 2 (April 3, 2007).

5 *Supra* note 1 at p. 230.

warming liability claims worldwide impacting on the public and private sectors, climate change litigation can be described as litigation which arises from:

(a) A cause of action where climate change is the alleged casual factor in the context of a civil wrong, tort or delict such as negligence or nuisance, which has led to an alleged liability (liability litigation);

(b) An administrative law claim against a public authority challenging any action, inaction, breach of statutory duty or constitutional law or other failure properly or fairly to regulate or take into consideration greenhouse gas emissions in the authority's decision- making processes (administrative law litigation); and

(c) Other ancillary legal cause of action arising out of growing public awareness of climate change matters. These can include alleged breaches of advertising regulations and standards in the course of making claims in respect of climate change, or alleged failure by companies, their directors or officers to adequately report climate change and other environmental impacts affecting company performance which can lead to shareholder derivative actions, or other regulatory action (consequential litigation).[6]

The objectives of climate change litigation tend to be either: to seek compensation for harm to the environment, property or human health cause by global warming (in case of a liability litigation arising from an allegation that climate change is the cause of damage complained of);or in the case of all the three forms of litigations identified above, to prevent or reduce global warming (e.g. by challenging government acts or omissions relating to climate change), by way of judicial review or by petitioning to the disclosure of corporate behaviour which can have an impact on climate change.[7]

3.1 Sources of Climate Change Litigation

Here a few case laws to date will be explored that arises in climate change litigation and disputes world over. The different sources of climate change litigation are identified and are listed below and specific legal issues arising out of the case law are further considered.

3.1.1 Liability Litigation

Liability litigation comprises any proceeding, action, claim or dispute in public, private or international law, in which it is alleged that climate change is the casual connection to the alleged damage or loss for which compensation is sought. Whilst it is possible in principle for individual to sue corporate defendants in torts for damage resulting out of GHG emissions,[8] liability litigation is probably the most difficult for plaintiffs to succeed-for example, because of the complex issues of standing, justifiability, forum and causation which commonly arise.[9] The examples of liability litigation can be found in:

---

6 *Ibid.*

7 *Ibid,* at p. 231.

8 David A Grossman, "Warming Up to a Not-so-radical Idea: Tort-based Climate Change Litigation", 28 *Columbia Journal of Environmental Law,* 1 (2003).

9 *Supra* note 1 at p. 231.

3.1.1.1 The Law onNuisance

Nuisance can be categorised as either public or private under common law, or otherwise statutory. A private nuisance takes place when one use one's property in a manner that harms the property interests of others. Theoretically, if a company uses its property in a way that harms other's property interests by contributing to global warming, it can be held liable under private nuisance. Climate change, is however, a broad problem that has less to do with defendants' use of their property and that involves much less direct "annoyance" with "neighbours". Therefore, private nuisance does not seem like a good fit for a climate change lawsuit.[10] Public nuisance is more appropriate remedy for climate change cases.[11] Recent international decisions on public nuisance relating to climate change are listed below.

State of Connecticut, et al. v. American Electric Power company Inc., et al.,[12] in July 2004, eight States California, Connecticut, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin and the city of New York (generally, hereinafter, "the States") filed a complaint against defendants American Electric Power Co., Inc., American Electric Power Service Corp.,[12] Southern Company, TVA, Xcel Energy and Cinergy Corp. The complaint sought "abetment of defendants' ongoing contribution to public nuisance" under federal common law, or in the alternative, under state law. Specifically, the States asserts that Defendants are "substantial contributors to the elevated levels of carbon dioxide (CO_2) and global warming", as their annual emissions comprise "approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States".

The complaint cites report from the Intergovernmental Panel on Climate Change (IPCC) and U.S. National Academy of Sciences to support the States' claims of a casual link between heightened greenhouse gas concentrations and global warming, explaining that carbon dioxide emissions have persisted in the atmosphere for "several centuries and thus have a lasting effect on climate". The States posit a proportional relationship between CO_2 emissions and injury: "The greater the emissions, the greater and faster the temperature change will be, with greater resulting injuries. The lower the level of emissions, the smaller and slower the total temperature change will be, with lesser injuries".

As a result, the States predict that these changes will have substantial adverse impacts on their environments, residents, and property, and that it will cost billions of dollars to respond to these problems. Not only the complaint spell out expected future injuries resulting from increased carbon dioxide emissions and concomitant global warming, but it also highlights current injuries suffered by the States. The

---

10 Arindam Basu, "Climate Change Litigation in India: Seeking New Approach through the Application of Common Law Principles", *NALSAR Law Review*, Vol.5. No. 1 (2010), 45-49 at p. 48.

11 *Supra* note 8 at p. 52.

12 Cited in *International Journal of Environmental Consumerism, Vol. 6, Issues 11 and 12*, (January – December, 2010), 83-86.

States claim that the impact on property, ecology and public health from these injuries will also cause extensive economic harm.

Seeking equitable relief, the States seek to hold Defendants jointly and severally liable for creating, contributing to or maintaining a public nuisance. They also seek permanently to enjoin each Defendant to abate that nuisance first by capping CO_2 emissions and then by reducing emissions by a specified percentage each year for at least ten years.

Also on July 2004, three land trusts filed the complaint against the same six Defendants named in the States' complaint. The Trusts also base their claims on the federal common law of nuisance or, in the alternative, "the statutory and/or common law of the private and public nuisance of each of the States". They assert that reductions in Defendants' "massive CO_2 emissions will reduce all injuries and risks of injuries to the public, and all special injuries to Plaintiffs, from global warming". Accordingly, the Trust seek to abate Defendants' "on going contribution to global warming".

The District Court dismissed the complaints, interpreting Defendants' argument that "separation-of-powers principles foreclosed recognition of the unprecedented 'nuisance' action Plaintiffs assert" as an argument that the case raised the non-justifiable political question.[13] Drawing on *Baker v. Carr,*[14] in which the U.S. Supreme Court enumerated six factors that may indicate the existence of a non-justifiable political question...According to the district Court, the broad reach of the issues presented revealed the "transcendently legislative nature of this litigation".[15]

However, in September 2009, restoring the case, the Second Circuit Court of Appeals reversed the District Court's judgement. It held the political question doctrine did not bar the Court from considering the case and all plaintiffs had standing to bring "public nuisance" lawsuit against power companies for injuries caused by climate change.[16] This decision does not address the final question though, as rehearing is still pending.

It is observed that the district Court erred in dismissing the two complaints on the ground that they presented non-justiciable political questions...All parties have stated a claim under the federal common law of nuisance, which is grounded in the definition of "public nuisance".[17] With regard to air pollution, particularly greenhouse gases, this case occupies a similar to the one Milwaukee[18] occupied with respect to water pollution. With this in mind, the concluding words of Milwaukee have an resonance almost forty years later.

To paraphrase: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that

---

13 *Ibid,* at p. 271.
14 369 US 186, 198 (1962).
15 406 F Supp 2d at p. 270.
16 *Supra* note 10 at p. 49.
17 *Supra* note 12 at p. 85.
18 *Illinosis v. City of Milwaukee*, 406 US 91 at p. 106 (1972).

comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance" by greenhouse gases.[19]

In *Native Village of Kivalina v. Exxon Mobil Corp,*[20] is an example in the context of climate change displacement. In this case the plaintiffs are the residents of the native Alaskan Inupiat village of Kivalina comprised of approximately 400 people whose ancestors have occupied the area since 'time immemorial'.[21] Kivalina is located on the tip of a six-mile barrier reef located between the Chukchi Sea and the Kivalina and Wulik Rivers on the Northwest coast of Alaska, some 70 miles north of the Arctic Circle. The Plaintiffs claim that the global warming is destroying their village and as a result they must be relocated soon, or alternatively the village must be abandoned and cease to exist. The United States Army Corps of Engineers and the United States Government Accountability Offices have undertaken studies of the viability of a number of native villages in Alaska, concluding in case of Kivalina that '[r]emaining of three island...is no more viable option for the community'.[22] Both bodies conclude that Kivalina must be relocated due to the effects of climate change and estimate the cost somewhere between $95 and $400 million.[23]

Based on these facts, Kivalina had filed a complaint for damages against the group of 19 oil, coal and power companies. The plaintiffs allege three main causes of action: nuisance, conspiracy and concert of action.[24] First, Kivalina seeks monetary damages for the Defendant's contribution to global warming through emissions of large quantities of greenhouse gases. In respect of this cause of action, the plaintiffs claim public nuisance under federal common law, and in the alternative public and private nuisance under state law. Secondly, Kivalina seeks monetary damages for civil conspiracy against eight of the Defendants for allegedly participating in an agreement with each other to mislead the public about the science of global warming and to delay public awareness of the issue. Finally, Kivalina alleges that the Defendants have engaged in tortious acts in concert with each other relating to the creation, contribution to, and/or maintenance of public nuisance of global warming.

The Defendants responded in June 2008 by seeking to have Kivalina's action dismissed due to what they allege to be inordinately difficult problem of factual proof in tracing property losses suffered by the plaintiffs to human- induced changes to the global climate. Moreover, the Defendants claim that there is no precedent for holding a collection of Defendants liable for such global atmospheric damage.

The suit was dismissed by the United States District Court on September 30, 2009 on the ground that regulating greenhouse gas emission was a political rather than a legal issue and one that needs to be resolved by the government and the administration rather than Courts.

---

19 *Supra* note 12 at p. 86.

20 No. CV-08-01138 SBA (ND Cal) (Complaint, filed on February 26, 2008). Available at: *www.pawalaw.com/assests/docs/kivalina-vs-exxon-08-1138-sba.pdf* (accessed on 18 August, 2012).

21 *Ibid.*

22 *Ibid.* Also see United States GAO 32 (2003).

23 Kivalina Complaint, para 186.

24 *Ibid,* Paras 249-82.

The US Courts have dismissed other common-law climate-change based claims because, among other things, they have raised non-justiciable political questions that are beyond the competence of Courts. Even in the event that the Court accepts the complaint as justiciable, challenges persist in the form of establishing standing and causation, which would well hamper its success.[25]

The above mentioned two important decisions cast considerable doubt on the present viability of public nuisance claims alleging contributions to global warming, based on non-justifiability issues predicted on the doctrine of separation of powers. Notwithstanding this, nuisance remains a popular cause of action in climate change relate suits.[26]

Another significant case on climate change based on the ground of nuisance is *Comer v. Murphy Oil USA,*[27] where the three -member panel of the Fifth Circuit Court revived a lawsuit filed by residents along the Mississippi Gulf coast against several corporations in the energy and fuels industries, alleging they were responsible for property damage caused by Hurricane Katrina. Initially in 2007, the plaintiffs sought damages under the tort theories of unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment. At the district Court level, the defendants were successful in dismissing plaintiffs' complaint. The United States District Court for the Southern District of Mississippi granted the defendants motions and dismissed the action on the ground that plaintiff did not have standing to raise political question that should not be resolved by judiciary. The Court also found that the harm was not traceable to individual defendants. On 16 October, 2009 the U.S. Court of Appeals for the Fifth Circuit overturned a District Court dismissal in part, holding that the plaintiffs both have standing to raise at least three of the claims (nuisance, trespass, negligence).

This recent development in *Comer v. Murphy Oil USA* is very important because this may set a parameter of future climate litigation for the American Courts. Also it may provide answer to a question whether a corporate entity can be made liable for catalysing devastating climatic incidents along with clarifying plaintiff's legal stand to bring a suit for such activities.[28]

3.1.1.1.1 The Law on Negligence (Fault and Duty of Take Care)

Generally, in common law, in order to establish a claim in negligence, a plaintiff must prove that: (i) the defendant owed a duty of care to the plaintiff; (ii) that duty of a care was breached; (iii) the defendant's breach of the duty of care caused the injury

---

25 Angela Williams, "Promoting Justice within the International Legal System: Prospects for Climate Refugees" in Benjamin J. Richardson et al. (Eds.), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (2009), 81-101 at p. 93.

26 *Supra* note 1 at p. 233.

27 585 F.3D 855 (5th Cir. 2009); Full text is available at: *http://www.ca5.usCourts.gov/opinions /pub/07/07-60756-CV0.wpd.pdf,* (accessed on 20 August, 2012).

28 *Supra* note 10 at p. 50.

or damage suffered by the plaintiff; and (iv) the injury or damage suffered was foreseeable, and not too remote a consequence of the breach of duty.[29]

In climate change litigations these necessary elements of negligence are difficult for the plaintiff to establish. For example, most GHGs are emitted with lawful authority, either by way of licence or concession from the relevant regulator. It will usually be difficult to argue that an installation's emission of GHGs was "unreasonable" if it was unlawful in this sense.[30] Categories of negligence can change over time in accordance with social needs and so too can the persons legally bound to exercise a duty of care.[31] Notwithstanding this, a duty of care will be a significant hurdle for claimants for any negligence-based climate-change liability litigation. It will depend on the facts of each case whether the relationship between the claimant and the defendant is one where a duty of care is owed. Generally, the question turns on whether it is considered reasonably foreseeable that the defendant's act or omissions would be likely to cause the harm complained of by the claimant.[32] The challenges associated with proving causation present a particularly difficult burden for claimants in climate change litigation.

It is expected that scientific challenges may continue to affect climate change lawsuits based on public nuisance and negligence actions. It is also argued that plaintiffs may be successful by applying those common law theories. If it happens as expected, the damages and cost of adaptation will be enormous and the interest in the finding parties to pay those costs will likewise be enormous.[33]

4.1 Human Rights and Climate Change Litigation

Human rights are another area of law that have been used by plaintiffs attempting to seek redress for damage caused by climate change. International environmental claims based in human rights can arise under specific regional and international declarations, conventions and agreements. "Environmental" human rights claims are usually framed in relation to right to life, property, personal security and health as opposed to environmental grounds alone and, as such, in the context of climate change, causation will be an important element in demonstrating that a human right was infringed due to any specific weather event or state of affairs arising from climate change.[34] In this regard, the general consensus is that there is no international human right to be free of pollution, global warming or climate change *per se*.

Damages are more likely to be awarded, however, within national jurisdictions for human right breaches leading to actual damage and harm. A recent example of

---

29 R. K. Bangia, *Law of Torts*, (2nd edn. 2010, reprint 2011), p. 279.

30 *Supra* note 1 at p. 233.

31 Michael Kerr, "Tort Based Climate Change Litigation in Australia", *Australian Conservation Foundation*, (March, 2002). Available at: *www.acfonline.org.au* (accessed on 20 August, 2012).

32 As scientific knowledge develops, the legal question of whether it was reasonably foreseeable that certain actions would cause or contribute to global warming or its knock-on effects may gradually be answered differently by the Courts. However, the claimants will usually also be required to demonstrate that the specific harm complained of ... were a reasonably a foreseeable consequence of the defendant company's action and this is even a more difficult hurdle.

33 *Supra* note 10 at p. 50.

34 *Supra* note 1 at p. 236.

human right issues intermingling with environmental damage in the national context arises out of the decision of the Federal Court of Nigeria on November 14, 2005 to order the complete cessation of gas flaring in the Niger Delta by the Nigerian National Petroleum Corporation (NNPC) and six oil companies. In this case i.e., *Barr et. al. v. Shell Petroleum Development Company of Nigeria et al,*[35] the plaintiffs sued on behalf of themselves and representing the communities in Nigeria and the plaintiffs were of the view that the gas flaring was alleged to contribute to greenhouse gas emissions and to produce toxic gases impacting on human health. The plaintiffs, eight individuals each living in different communities impacted by gas flaring, were held to have had their "fundamental rights to life and dignity of human person" violated under the Nigerian Constitution, the African Charter on Human and Peoples Rights and the Nigerian Environmental Impact Assessment Act,2004.Importantly, the Court granted declaratory relief to the effect that right to life and dignity of human person also include a right to a " clean, poison-free, pollution-free healthy environment". It also ordered the legislative action to amend the gas flaring provisions...in order to make the legislation consistent with the human rights provided for under the Nigerian Constitution.

Another example of climate change litigation based on human rights is that of the petition filed with the Inter-American Commission on Human Rights by the Inuit Circumpolar Conference, claiming that climate change policy in the United States was in violation of the Inuit and other Arctic Indigenous people's human rights.[36] Whilst the petition was ultimately rejected on evidentiary grounds, it largely challenged US energy policy and lack of regulations on greenhouse gas emission which were alleged to be causing destruction to homes, roads and other structures, and violating a host of human rights as a result. Whilst US government would not have been bound by any decision given the commission's lack of enforcement powers, any recognition by the Commission that (i) the US government's act or omissions had caused climate change, and (ii) the climate change had led to human rights violations, would arguably have established a precedent encouraging further climate change and human rights claims to be made in various Courts, tribunals and other fora.[37]

5.1 Administrative Law, Litigation and Climate Change

Governments are under increasing scrutiny by civil society in relation to how they regulate, or fail to regulate GHG emissions. This is particularly so for those governments which have ratified the Kyoto Protocol and implemented consequential laws and policies in order to regulate GHG emissions. With new regulatory regimes come new opportunities for plaintiffs to challenge governmental decision making.[38] The most significant decision relating to administrative law litigation is that of the US Supreme Court in *Massachusetts v. Environmental Protection Agency*,[39] ruled

35 No FHC/CS/B/1256/2005 (Nigerian F.H.C.).
36 *Supra* note 1 at p. 237.
37 *Ibid,* at p. 238.
38 *Ibid,* at p. 239.
39 127 S. Ct. 1438 (2007).

that country's environmental agency had the authority and responsibility to regulate carbon dioxide emissions and other greenhouse gases (GHGS) under the Clean Air Act, 1963, as an "air pollutant".

The Court was hearing the case filed against EPA by Massachusetts and 11 other states, and environmental groups and others in 1999 petitioning EPA to set carbon-dioxide emissions standards.[40] US Supreme Court's decision in this case has significantly altered the government's policy and re-drawn the litigation landscape. Massachusetts and several others brought claims against the U.S. Environmental Protection Agency (EPA) challenging the agency's decision not to regulate GHG emissions from motor vehicles under the Clean Air Act, 1963. Massachusetts contended that under the Clean Air Act, EPA had the responsibility to regulate any air pollutant including GHGs that can "reasonably be anticipated to endanger public health or welfare". The U.S. Supreme Court decided that the Clean Air Act, 1963 does give EPA the power to regulate.[41]

This case is typically an example where the US Supreme Court decided an administrative law question whereby avoiding a much disputed issue of the scientific evidence for climate change.[42] Although, administrative law cases are not subject to Daubert Standard.[43] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[44] the US Supreme Court established Daubert standard for admissibility of scientific expert testimony. To be admissible under Daubert, expert testimony must be both reliable and relevant. A Court first must ask whether the scientific ideology underlying the testimony is reliable-is it "ground[ed] in the methods and procedures of science" and "supported by appropriate validation". While Daubert challenges have primarily worked to the benefit of defendants, there is no reason why plaintiffs cannot use them in climate change litigation where the plaintiff's position is supported by the weight of scientific evidence). and the Federal Rules of Evidence, they do help in making up the backdrop of climate change litigation in which common law actions proceed.[45] However, establishing scientific evidence in climate change litigation is an important step in deciding the standing of the parties.

The Supreme Court's above decision has paved the way for a multitude of judicial and administrative challenges seeking to compel the EPA to regulate GHG emissions.[46]

6.1 Drawing Inspiration from Affluence: Scope and Potentiality of Climate Change Litigation in India

Climate change litigation has its basis on liability claims as civil society more and more believes that human actions and emission of certain greenhouse gases into the

40 "Fixing Onus", *Down to Earth,* (April 30, 2007).
41 *Supra* note 10 at p. 48.
42 Ryan Hackney, "Flipping Daubert: Putting Climate Change Defendants in the Hot Seat", 40 *Envtl. L.,* 260 (2010).
43 *Ibid,* at p. 265.
44 509 U.S. 579 (1993).
45 *Ibid,* at p. 261.
46 *Supra* note 1 at p. 243.

atmosphere can lead to grim consequences for the environment, property and human health. It creates the possibility of future litigations against the governments or corporations engaged in commercial activities. Once commenced it creates whole new legal challenges of which both plaintiffs and defendants must be aware.[47]

In India, the first two possibilities discussed above under the meaning and objective of climate change litigation (i.e., liability litigation and administrative law litigation) are already being explored but in entirely different environmental context and not as a part of climate litigation.[48] Broadly speaking, in India the citizen has a choice of a following remedies to obtain redress in case of violation of their environmental right:

(a) A common law action against the polluter including nuisance and negligence;

(b) A writ petition to compel the authority to enforce the existing environmental laws and to recover clean up costs from the violator;

(c) Redress under various environmental statues like Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act of 1974, Air (Prevention and Control of Pollution) Act, 1981 etc.; or

(d) Compensation under the Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995 in the event of damage from a hazardous industry accident.[49]

Nuisance and negligence actions are very common in India these days when it comes to check environmental pollution.[50] But, unfortunately, none of them have been used so far to include climate litigation purely.

7.1 Climate Change and Constitutional Impact

Climate change, if unmitigated, will directly and indirectly bear upon Article 21 rights that are guaranteed under the Indian Constitution. This is evident in some of the early predictions made by scientists and some preliminary observations of the possible climate-related occurrences.[51] Some early observations of the effects of climate change are also becoming visible. In early 2007, an Indian farmer was reportedly forced to abandon his ancestral agriculture land because it was part of two islands submerged in The Sunder ban region. Absent compensation and support from their government, the farmer moved to urban areas in search of alternative livelihood. The incident, which have attributed to climate change related sea level rise, portend the fate of some of the nearly 65 per cent of India's population that is dependent on agriculture, forestry and fisheries for a living.[52]

---

47 *Supra* note 10 at p. 45.

48 *Ibid.*

49 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statues,* 87 (2002).

50 Among all these remedies, the writ jurisdiction is more popular. The action in tort is rarely used and statutory remedies are largely untried.

51 Deepa Badrinarayana, "Indian Constitutional Challenge: A Less Visible Climate Change Catastrophe" in Benjamin J. Richardson et al. (ed.), *Climate Change and Developing Countries-Legal and Policy Challenges for the World Economy* (2009), 63-83 at p. 68.

52 *Ibid,* at p. 69.

The Indian Constitution,...could serve as a potential basis for pursuing climate change litigation within India, not only because of its substantive provisions but also because the Supreme Court of India has facilitated the enforcement of fundamental constitutional rights by relaxing several formal procedural rules, which generally impedes access to Courts. Firstly, the Court has waived "ripeness" requirements for bringing an action, on a ground that in a country where most people are unaware of their rights, violations should be addressed before they occur.[53] Thus, the presence of substantial threats of climate-related violations should be sufficient to invoke the Court's writ jurisdiction under Article 32.[54]

Secondly, the Court has the authority to determine whether an injury has occurred, without relying on statutory enactments. Further, petitioner need not to satisfy any additional standing requirements such as causation and redresability (i.e., the remedy). Further, any person with 'sufficient interest' in helping poor and vulnerable sections of the population can seek judicial review. In the alternative, the Court can assume suo mottu jurisdiction by treating newspapers reports or letters as writ petitions. Finally, the Court can provide broad remedies; it can issue a writ of mandamus not only ordering the government to perform non-discretionary functions, or enjoining it from performing statutorily prohibited actions, but also requiring it to perform discretionary functions. The judiciary could also issue 'continuing mandamus', obliging the government to take specific actions and report progress on a regular basis.[55]

This unique alignment of procedural flexibilities and substantive rights that will be affected if climate change is not mitigated provided a sound basis for pressing forth a constitutional rights violation argument in the Indian context.[56]

8.1 Nuisance Related Climate Change Cases in India

In India, public nuisance so far has covered issues ranging from sewage cleaning problem to brick grinding operations, from hazardous waste management to factories untreated effluent discharges. But climate change is still unexplored. It has to be further understood that in liability claim proceedings based on nuisance or negligence arising out of global warming, the plaintiff always faces problem to establish his standing because it is extremely difficult to set up a casual connection between the injury suffered by the plaintiff and defendant's emission of greenhouse gases.[57]

Also, remedies available in India for public nuisance, in general, are impressive. Section 268 of IPC, 1860 provides the definition of public nuisance. According to the section "a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public

---

53 *Basheshar Nath v. Commissioner of Income Tax,* AIR 1959 SC 149, holding that waiver of fundamental rights could not be upheld in a country where many people were ill-informed about their rights. Cited in *supra* note 49 at p. 70.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Supra* note 10 at p. 52.

or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasions to use any "public right".[58] It again provides that "a common nuisance is not excused on the ground that it causes some convenience or advantage". Persons who conduct 'offensive' trade and thereby pollute the air, or cause loud and continuous noises that affect the health and comfort of those dwelling in the neighbourhood are liable to prosecution for causing public nuisance. This, however, is less attractive because the penalty for this is merely Rs. 200, which makes it pointless for a citizen initiate a prosecution under section 268 of IPC, by a complainant to a magistrate.[59]

A much better remedy is available under Section 133 of the Code of Criminal Procedure, 1973 which deals with the Conditional order from the magistrate for removal of nuisance. This section provides an independent speedy and summary remedy against public nuisance.[60] In the famous judgement of *Municipal Council, Ratlam v. Vardichand*,[61] the Supreme Court of India has interpreted the language of Section 133 of Cr.P.C. as mandatory. Once the magistrate has before him the evidence of public nuisance, he must order to remove such within a specified time. This case was decided in relation to water pollution where the Court directed the municipality to take immediate action to remove the nuisance. The same principle can also be applied in case of air pollution and it is not uncommon for the Court in India to come down heavily on industries for polluting air.[62]

Same can also be said about action for negligence that may be brought to prevent greenhouse gas emission. In an action for negligence, the plaintiff must show that the defendant was under a duty to take reasonable care to avoid the damage complaint of and the defendant has made a breach of that duty resulting in the damage of the plaintiff.[63]

An act of negligence may also constitute a nuisance if it unlawfully interferes with the enjoyment of another's right in land. It may also breach of the rule of strict liability if the negligent act of the defendant allows the escape of any dangerous thing which he had brought on the land. Establishing casual connection between the negligent act and the plaintiff's injury is probably the most problematic link in pollution cases[64] and in climate change matter it is even more difficult because of uncertainty of scientific data.

Further, looking into some of the environmental legislations, there are some provisions that can be very well used by the plaintiff in climate change litigation. Needless to mention here that all these provisions may be used by the prospective litigants to bring actions for damage suffered on property or health by industrial

58 The *Indian Penal Code*, 1860, S. 268.
59 *Supra* note 49 at p. 87.
60 *Ibid,* at p. 112.
61 AIR 1980 SC 1622.
62 *Supra* note 10 at p. 55.
63 *Ibid.*
64 *Supra* note 49 at p. 100.

activities. Moreover, establishing casual connection between damage and emission by industries will be much easier if the Court look in to the existing emission norms for different localities set by the government under various environmental statues.[65]

9.1 Role of Judiciary in India to Control Atmospheric Pollution

The Indian judiciary has not got an opportunity till now to address the problem of climate change through its pronouncements but in number of occasion's judiciary got a opportunity to address this menace though indirectly, which shows that while deciding any land marking case the concern about the problem of climate change is in the mind of judiciary. Be it a case of accidental gas leakage or continuous emissions of poisonous gases from vehicles and industry, environmental protest is increasingly becoming more strident. As the executive has repeatedly failed to secure environmental safety and protection, people seek redressal from the judiciary.[66]

"The failure on the part of the government to respond to the emerging crisis by enacting appropriate laws and implementing them, has made judicial intervention to lay down basic principles of environmental matter crucial", says Justice P N Bhagwati, former Chief Justice of the Supreme Court.[67]

The Supreme Court gets deeply involved with its most significant air pollution cases of the decade:

> The public interest litigation on air pollution in the Taj Trapezium filed in 1984 and the air pollution case in Delhi filed in 1985 has been the focus of one of the most long drawn legal battles over air pollution in the country.

Based on the reports of various technical authorities mentioned in this judgment, court have reached to the finding that the emissions generated by the coke/coal consuming industries are air pollutants and have damaging effect on the Taj and the people living in the TTZ. The atmospheric pollution in TTZ has to be eliminated at any cost. Not even one per cent chance can be taken when human life apart the preservation of a prestigious monument like The Taj is involved. In any case, in view of the precautionary principle as defined by this Court, the environmental measures must anticipate, prevent and attack the causes of environmental degradation. The 'onus of proof' is on an industry to show that its operation with the aid of coke/coal is environmentally benign. It is, rather, proved beyond doubt that the emissions generated by the use of coke/coal by the industries in TTZ are the main polluters of the ambient air.

The air pollution case in Delhi has moved toward directing specific laws and implementation. The significant principle that emerged from the case is Justice Rangnath Mishra's observation in his ruling of November 14, 1990.[68] He had observed:

> Law alone...cannot help in resorting a balance in the biospheric disturbance. Nor can funds help effectively. The situation requires a clear perception and imaginative planning. It also requires sustained efforts and result-oriented strategic action.

---

65 *Supra* note 10 at p. 57.

66 *State of India's Environment - The Citizens Fifth Report Part-I,* (1999), p. 203.

67 *Ibid.*

68 Sukanta K. Nanda, *Environmental Law,* (2002), pp. 144-145.

However, unlike the many parts of the world especially U.S., Australia etc. Indian judiciary yet has not got an opportunity to address the cases which specifically deals with the problem of climate change. Though judiciary in India plays a proactive role in solving the various environmental problems. While pronouncing two of the significant air pollution cases of the decade i.e. Taz trapezium and Oleum gas leakage case it becomes evident that the framers of the judgement were conscious of the emerging problem of climate change and that is the reason the Court decided the case of TTZ keeping in mind the atmospheric problem which is causing damage to this historic monument. The Court went on to opine that:

> The atmosphere pollution in the Taz Trapezium zone has to be eliminated at any cost...[69]

In deciding another land marking case of *Banawasi Seva Ashram v. State of Uttar Pradesh and others*,[70] the Court while tried to balance between the twin needs of development and the traditional rights of the forest dwellers thus harping the concept of sustainable development also laid down the emphasis on the importance of forests. The Court was of the opinion that:

> Indisputably, forests are a much wanted national asset. On account of the depletion thereof, ecology has been disturbed; climate has undergone a major change and rains have become scanty. These have long term adverse effects on national economy as also on living process.

10.1 Concluding Observations

The increasing number of climate change litigation has made it one of the up-and-coming environmental issues in recent time. Climate change litigation is marred by the scientific, economic, political questions which are considered as significant impediments in devising opposite litigation strategy. The world is truly divided when it comes to the attitude of the Courts in encouraging this type of cases till date. In India climate change litigation is yet to take off. Climate claims will have a strong footing in India in years to come depending upon working out an objective legal strategy based on some of the common law principles like public nuisance and negligence. Although, for critiques climate change litigation based on common law theory may still appear uncertain, the potentiality of such suits cannot be overlooked in providing the new dimension in entire climate change discussion.[71]

---

69 *M. C. Mehta v. Union of India*, AIR 1997 SC 761.
70 AIR 1987 SC 374.
71 *Supra* note 10 at p. 45.

LAW RELATING TO SETTLEMENT OF SPOUSAL PROPERTY IN INDIA : A NEED FOR REFORMS

Balwinder Singh*

1.1 Introduction

Marriage, purportedly an equal partnership, should ideally translate into equal stakes in the rights and the duties for both the partners - the husband and the wife. But in reality, women have been less equal. Men have traditionally wielded power and dominance in a household while women have been dependent and marginalized in this equation. It is a well known fact that every marriage involves a co-operative effort of the spouses, whether overt or covert, in the accumulation of assests. These assests may stand in the name of the husband or the wife, or in their joint names.[1] All these assests accumulated during the subsistence of marriage are cumulatively known as Matrimonial or Spousal property. Whereas, the sum of rules governing the property rights between the spouses during marriage and the rules for division of matrimonial assets (spousal property) in the event of divorce or legal separation constitute matrimonial property regime.

Generally, during the subsistence of marriage, the legal systems throughout the world traditionally follow one of the two systems to govern the property of the spouses *viz.*, the separation of property and the community of property. In the former, as the name itself implies, husband and wife have absolute freedom to manage their properties as if they are unmarried. The notion that marriage is an economic partnership does not find recognition and in particular, the mere fact of marriage does not affect the rights of property owners.[2] Therefore the sharing of assests of husband and wife is not institutionalized. On the other hand, in the community of property system the notion of partnership of husband and wife in the properties belonging to them has been institutionalized. The basis of the community property system is the idea that marriage also creates what amounts to an economic partnership between the husband and wife, in which they share ownership of certain property.[3] The predetermined assests of husband and wife (either by law or by contract) are treated as a single mass.[4] This marital property includes earnings, all property bought with those earnings, and all debts, accrued during the marriage. The generally accepted idea is that spouses are partners in the marital economic enterprise, which encompasses all acquisitions during marriage that result from the efforts of either spouse. Premarital acquisitions, as well as gifts or inheritances received by one spouse during marriage, are not considered part of this economic partnership. Community property begins at

---

* Ph.D. Research Scholar, Department of Law, University of Jammu, Jammu – 180 006.

1 B. Sivaramayya, *Matrimonial Property Law in India*, p. 1, Oxford University Press, New Delhi, 2002.

2 L. A. Buckley, "Matrimonial Property and Irish Law: A Case for Community," *Northern Ireland Legal Quarterly*, 2002, pp. 30-39.

3 Jerry A. Kasner and Alvin J. Golden, "An Overview of Community Property Law," *American College of Trust and Estate Counsel*, 2-7 March, 1999, pp. 1-6.

4 Charlotte K. Goldberg, "Opting In Opting Out: Autonomy in the Community Property States," *Louisiana Law Review*, Vol. 72, 2011, pp 1-13.

the marriage and ends when the couple physically separates with the intention of not continuing the marriage. So, any earnings or debts originating after this time will be separate property.[5]

During the subsistence of marriage, these classifications may seem trivial, but in the unfortunate events of divorce, these details become very important. On divorce, in the separation of property system, the right of the wife in the husband's property is restricted to getting maintenance and that too if she does not have an income of her own. This system prevails in Common law and in other countries that have inherited English system of law. In India also, the separation of property system prevails in the personal law of Hindus, Muslims and Parsees. Whereas, in many European countries, as well as the countries those were once their colonies or were aligned to them culturally, the community of property, as a matrimonial regime, dominates and on the termination of marriage the assests are shared equally between both the spouses. In The United States of America, in California, Arizona, Louisiana, Texas, Washington, New Mexico, Nevada, Idaho etc., this system prevails.[6] In India it prevails in Goa and Pondicherry. Both the systems has their drawbacks, often, a very serious criticism against the separation system is that it fails to provide a share in the acquisitions made by the other spouse. For e.g. if a wife devotes all her time to the care of the family, and the husband is the only one able to amass an estate by his work; there, then, exists the danger that at the end of their married life, the wife will not receive any share in the savings, the accumulation and protection of which she herself perhaps made possible.[7] On the other hand the major criticism against the community of property is its administration. No doubt the ownership and possession of common properties vest in both the spouses during the subsistence of marriage however for practical purposes, only one of the spouses can administer the properties. Chance of the wife's property going into the hands of the husband for control and administration are greater than that of the husband's property into the wife's hands. Sometimes, a joint control of community property is suggested but in practice it poses many irksome problems.[8] The other drawback of community property is, it would often be most unfair that one spouse should be able to claim a half-share of property which the other spouse has acquired for e.g. the case of a wife who has a lazy and improvident husband and who by her own hard work and thrift has managed to buy a house.[9]

A third type of system known as deferred community system is adopted by many countries in the world. The deferred community system represents the convergence of the separation of property and community of property. It is an effort to combine the positive features of both the systems and to eliminate the disadvantages. Sweden took the lead in 1920 and introduced changes in community of property. According

5 Friedmann, *Law in Changing Society*, p. 239, University of California Press, Berkeley, (1959).

6 W. A. Reppy & C. A. Samuel, *Community Property in the United States*, p. 12, Carolina Academic Press, United States, (2009).

7 *Supra* note 1 at p. 7.

8 Daggett, "Is Joint Control of Community Property Possible," *Tulane Law Review*, Vol. 10, 1936, pp. 589-598.

9 *Ibid*, at p. 10.

to these modifications married couples were governed by the legal community of property (as distinguished from the contractual community of property) the spouses retained their right to manage their properties after marriage, the community of property became operative on the dissolution of marriage and the spouses would be entitled to one-half each, of the entire properties remaining at the time of dissolution of marriage.[10] Norway, Finland, Denmark and Iceland followed the lead given by Sweden. Holland, Germany and Quebec adapted the basic features of the deferred community of Sweden, although there are deviations on some points.[11] Even some countries governed by common law, in the context of matrimonial property relations on divorce in their legislations, to a greater or lesser extent adapted the features of deferred community of property.

1.2 Spousal Property and its Division Under Different Legal Systems

In most of the countries, especially in the western hemisphere, the law relating to spousal property is a well developed law and is considered to be a sensitive branch of civil law.

1.2.1 English Law Developments

Under English law, husband and wife were held to be one person. The unity resulted in the merger of the wife's status with that of the husband. The result was that the husband had the right to manage her freehold estates, become the owner of her chattels (movable property) and could dispose of her leasehold property.[12] The old common law which worked much to the detriment of women was altered by the courts of equity when they propounded the doctrine of equitable separate estates.[13] Further, legislative measures also changed the scenario and today, a woman is *feme* sole when it comes to their property. The Morton Commission, however, pointed out (as early as 1969) that, "the contribution of wives made towards acquisition of family assets by performing domestic chores for gainful employment was not accounted for at all" Later, in the same year, the English Law Commission in its report of Financial Provision in matrimonial Proceedings recommended that, "the courts while ordering financial settlements must not only look at contribution made by wife in money or money's worth, but also her contribution made normally looking after house and family".[14] This view was given effect to in a landmark decision of *Porter v. Porter*,[15] where Sachs LJ observed that discretionary powers enable the court to take into account "the human outlook of the period in which they make their decisions". In the exercise of these discretions 'the law is a living thing moving with the times and not a creature of dead or moribund ways of thought. However the court also lamented in

---

10 Kahn and Freund, "Matrimonial Property-Some Recent Developments," *Modern Law Review*, Vol. 22, 1959, pp. 241-247.

11 Report of the Matrimonial Regimes Committee, Civil Code Reform Commission 6 (1966) (Canada).

12 E.H. Burn, *Cheshire's Modern Law of Real Property*, Butterworths, United Kingdom (1979), p. 923.

13 A.V. Dicey, *Law and Public Opinion in England*, p. 383, New Burns Wick, USA, 1914.

14 Report on Financial Provisions in Matrimonial Proceedings, L.C. No. 25, para 69.

15 All ER 643-644 (1969).

Pettit v. Pettit,[16] when Hudson L.J. observed: "I do not see as to how one can correct the imbalance which may be found to exist in property rights as between the spouses without legislation."

The judicial view was given effect to by The Matrimonial Proceedings and Property Act, 1970 where s.5 (1)(h) clearly mentioned , that, "the contribution made by each of the parties to the welfare of the family including any contributions made as looking after the home or earning for the family must be given regard to". Applying the Act came Lord Denning's landmark judgment of *Wachtel v. Wachtel*,[17] in which he clearly stated that the contributions made by a working wife were equal to those made by a housewife. The relevant provisions in the 1970 Act were re-enacted in substantially similar terms in Part II of the Matrimonial Causes Act 1973. English law is remarkable in the extent of the court's statutory powers to make financial provision orders, property adjustment orders or sale orders in divorce proceedings (ancillary relief proceedings). It is the court's jurisdiction to deal with all of the economically valuable assets of the two spouses.[18] Section 25 of the Matrimonial Causes Act, 1973 as substituted by section 3 of the Matrimonial and Family Proceedings Act 1984, sets out the familiar list of matters to which the court is to have regard in deciding how to exercise these powers.[19]

Over the last three decades, the courts have had problems in determining financial and non-financial contributions to family welfare. The highest appellate interpretation of section 25(2)(f) was the House of Lord's ruling in *White v. White*.[20] It has undoubtedly affirmed the "yardstick of equality" – in effect, equal shares. In this case Lord Nicholls stated that the equal division should be departed from only if, and to the extent that, there is good reason for doing so. This standpoint was confirmed in the 2002 *Lambert v. Lambert* case by the Court of Appeal. Thorpe LJ specifically clarified that "it is unacceptable to place greater value on the contribution of a breadwinner than that of the homemaker".[21] However, the Law Society's Family Law Committee[22] has pointed out the difficulties in dealing with the width of discretion open to different judges and the task of predictability in outcomes even after *White v. White*. Nevertheless, the Family law Committee's working party rejected the replacement of discretion by formula, and also rejected a straightforward equal division of assets as potentially unfair where the parent with custody needs to retain the former matrimonial home – the only significant asset in many cases – as a home for the children.[23]

---

16 All ER 385 (1969).

17 All ER 829 (CA) (1973).

18 Cretney. et al., *Principles of Family Law*, Sweet & Maxwell, London (2003), p. 89,

19 The *Matrimonial Causes Act*, 1973, S. 25 (2)(f)) The contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family.

20 1 AC 596 (2001).

21 N. Lowe and G. Douglas, *Bromley's Family Law*, Oxford University Press, Oxford (2007), p. 1082,

22 Law Society, Financial Provision on Divorce: Clarity and Fairness-Proposal for reform (2003).

23 *Supra* note 21 at p. 1083.

1.2.2 The American Law Developments

In the United States there are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. In all these states community of property prevails with or without modifications, alterations and adaptations. This is due to the compulsions of fragile marriages, the concept of spousal equality, changing family values and operational and management difficulties. "Community property" states do not always apply identical rules to determine the rights of spouses when a marriage ends. Indeed, there are some significant differences among these states.[24] However, all of them adhere to the distinction between separate and community property. Premarital acquisitions by a spouse and property acquired by one spouse during marriage by gift or inheritance are separate property, and acquisitions during marriage due to the effort of either spouse are community property. In a community property jurisdiction, most property acquired during the marriage is owned jointly by both spouses and is divided upon divorce, annulment or death. Joint ownership is automatically presumed by law in the absence of specific evidence that would point to a contrary conclusion for a particular piece of property. In *See v. See*,[25] Chief Justice Roger J. Traynor of the Supreme Court of California wrote: "If funds used for acquisitions during marriage cannot otherwise be traced to their source and the husband who has commingled property is unable to establish that there was a deficit in the community accounts when the assets were purchased, the presumption controls that property acquired by purchase during marriage is community property. The husband may protect his separate property by not commingling community and separate assets and income. Once he commingles, he assumes the burden of keeping records adequate to establish the balance of community income and expenditures at the time an asset is acquired with commingled property." The community property system is usually justified by the idea that such joint ownership recognizes the theoretically equal contributions of both spouses to the creation and operation of the family unit.[26] The spouses each have a 50% interest in each item of community property from the moment of acquisition; separate property is solely owned by the acquiring spouse. At dissolution the community estate is shared, but separate property is not, regardless of the length of the marriage.[27] Separate property remains separate, as long as it is segregated from other property, and the parties do not change title or sign a written agreement to change its character. This distinction between premarital acquisitions and gifts or inheritances by one spouse and acquisitions during marriage due to effort has also been accepted by a majority of the non-community property U.S. states as the

---

24 J. Thomas Oldham, "Everything is Bigger in Texas, Except the Community Property Estate: Must Texas Remain a Divorce Haven for the Rich," *Family Law Quarterly*, Vol. 44, 2010, pp. 290-302 at p. 293.

25 64 Cal 2d 778 (1966).

26 *Meyer v. Kinzer and Wife*, 12 Cal 247 (1859) Chief Justice Stephen Johnson Field of the Supreme Court of California wrote: "The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other."

27 The sole exception to this rule is Washington, where separate property can be divided at divorce.

guiding principle for how property should be dealt with upon divorce. "Separate property" is not to be divided, while "marital property" is shared.[28]

Whereas, States following the community of property approach have enacted and adopted laws based on the basic model of Uniform Marriage and Divorce Act (UMDA) which distinguishes separate property from marital property and lists out various factors that the courts must take into account while awarding maintenance to the claiming spouse equitably. The UMDA has two provisions that deal specifically with the disposition of the couple's property. One explains that the property should be fairly divided between the parties without regard to "marital misconduct." It lists factors to consider when apportioning the property, such as the "duration of the marriage, prior marriage of either party, ante nuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and need of each of the parties, custodial provisions, whether the Apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income." Contribution of the spouses to the family is also a consideration. The specific facts of each case must be examined to reach a fair and just division of property. The other option given by the UMDA outlines a slightly different scheme of how property should be divided. First, each spouse's separate property is given to the appropriate spouse, then the rest of the property (the Community Property) is divided without consideration of "marital misconduct." The factors to consider when making a division of the community property include the "contribution of each spouse to the acquisition of the marital property, including contribution of a spouse as homemaker; value of the property set aside to each spouse; duration of the marriage; and economic circumstances of each spouse when the division of property is to become effective." This option retains the distinction between property bought before the marriage (separate property) and property bought during the marriage (community property).[29] Many states have adopted some form of these tests for their courts to use when dividing property at divorce. Once an agreement is decided upon, the property settlement has the same enforceability as a contract.

1.2.3 Developments in other Parts of World

As far as the position in other countries is concerned in Tanzania Law of Marriage Act, 1971 provides that the court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale. The Court shall regard to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets.[30] In Malaysia, Law

---

28 Raymond C. O'Brien, "Integrating Marital Property into a Spouse's Elective Share," *Catholic University Law Review,* Vol. 59, 2010, pp. 611-689 at pp. 617, 688.

29 William A. Reppy, "Major Events in the Evolution of American Community Property Law and their import to Equitable Distribution States," *Family Law Quarterly*, Vol. XXIII, Issue 2, 1989, pp. 164-165.

30 *Law of Marriage Act*, 1971, S. 114.

Reform (Marriage and Divorce) Act, 1976 besides providing the division between the parties of any assets acquired by them during marriage by their joint efforts also provides that court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage and in this, the Court shall regard to the extent of the contribution made by the other party who did not did not acquire the assets to the welfare of the family by looking after the home or caring for the family and the needs of the minor children, if any of the marriage. It is further provided that in any case the party by whose effort the assets were acquired shall receive a greater proportion.[31]

Similar provision has been made in Singapore by Women's Charter.[32] The Matrimonial Property Act, 1976 of New Zealand gives a detailed enumeration of contribution to the marriage partnership and includes the care of any child of the marriage, or of any aged or infirm relative or dependent of the husband or the wife, the management of the household and the performance of the household duties, the provision of money, including the earning of income, for the purposes of the marriage partnership, the acquisition or creation of matrimonial property etc.,[33] The Matrimonial Property Bill, 2007 of Kenya gives a detailed account of Matrimonial property and includes the matrimonial home or homes, household goods and effects in the matrimonial home or homes, immovable property, owned by either spouse which provides the basic income for the sustenance *of* the family and any other property acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property.[34] The Bill also states that regarding the ownership of matrimonial property, it shall be deemed to vest in the spouses in equal shares irrespective of the contribution of either of them towards the acquisition thereof, and shall be divided accordingly upon the occurrence of divorce or dissolution of the marriage provided that in appropriate circumstances a determination can be made during the subsistence of the marriage.[35]

1.2.4 Developments in India

Unfortunately, a matrimonial property regime could not develop in India because of reasons more than one. Firstly, the marital rights in India are governed by diversified personal law systems which, for the most part, rest on religion and traditional practices. And, these personal laws still continue to maintain that family is the domain only of the husband, ignoring totally the socio-economic realities of life today. Secondly, under the separation of property principle being followed by the courts in India, on the English pattern, the property may either belong to husband or to wife. But, above all, prime reason why matrimonial regime could not be developed in this country has been the lack of sense of claim to matrimonial assets in the

31 *Law Reform (Marriage and Divorce) Act*, 1976, S. 76.
32 Women's Charter, S. 106.
33 The *Matrimonial Property Act*, 1976, S. 18.
34 The Matrimonial Property Bill, 2007, S. 7.
35 *Ibid,* S. 8.

divorced women.[36] In the past there were and at present there are concepts that recognize the equal status of the spouses in one form or the other. But experience reveals that they do not buttress the financial position of women. Altekar says that "the theory approved by the Hindu culture as early as the Vedic age was that the husband and the wife should be joint owners of the household and its property. The husband was required to take a solemn vow at the time of marriage that, he would never transgress the rights and interests of his wife in economic matters".[37] But the actual position points out that the vow of the husband was merely a token without any significant content or meaning. Altekar also points out that joint ownership of husband and wife remained a 'legal fiction' and that the husband remained the sole owner, without any remedy in favour of the wife. The wife had no right to incur any substantial expenditure during the subsistence of marriage without the husband's permission. Moreover a question naturally arises that if the property was jointly owned by the spouses, then as to how, in Hindu Law, the wife was deprived of her rights of ownership and inheritance on the death of her husband. On this, Kane's statement succinctly summarises the position[38] that, Apasthamba and Manu postulated the identity of husband and wife as single person, only in religious matters and not for secular or legal purposes.

1.3 Status of Married Women in Indian Household

An Indian woman, who seldom crossed the barriers of her home and hearth, today seeks a fair share in education and employment. With the advancement of women's education, a large number of women find a meaningful utility of their talents in the paid jobs outside. Moreover, the economic stresses in the family, desire to improve the social status etc., has necessitated fresh adjustments of the family budget and it is being gradually felt that unless husband and wife both earn money, they cannot operate the household decently.[39] But this change has given rise to new legal problems which were not peculiar to Indian family conditions, such as, the separate earning of husband or wife or both the spouses, their common contribution towards the expenses of the household, acquisition of properties intended to be used together and more complex problem of determination of the share of each spouse in the household assests.[40] The various personal laws in the country are uniform in recognizing the obligation of a husband to maintain his dependant wife, but the right of a wife to claim as part owner of a property acquired and owned jointly by the husband and wife during marriage is not recognized. Moreover, the input of the female to the family's income and in the acquisition of family property is still not evaluated in terms of the contribution even today.

---

36 R.K. Sinha, "Socio-economic changes and the Absence of Matrimonial Property Regime in India," *Law, Justice and Social Change*, (Ed. D.R. Saxena), Deep and Deep Publications, New Delhi (1996), p. 61.

37 A.S. Altekar, *The Position of Women in Hindu Civilisation*, Motilal Banarsidass, Delhi, (1959), p. 214.

38 P.V. Kane, *The History of Dharmasastra*, Vol. II, Bhandarkar Oriental Research Institute, Poona (1973), p. 573.

39 *Supra* note 36 at p. 55.

40 *Ibid,* at p. 56.

No doubt the conditions are changing fast in India and a large number of women are working and earning. But still this fact is of great significance that majority of married women do not have any independent source of income and many women give up their employment after marriage in order to devote their time to family obligations, particularly bringing up of children. They are, therefore, economically dependent on their husbands. In most cases of property acquired during marriage, both movable and immovable, it is paid for out of the husband's earnings. A matrimonial home is normally registered in the husband's name and so also things brought for the household. The principle of determining ownership on the basis of financial contribution is unjust and works inequitably against women.[41] A legal recognition should be given to the economic value of the contribution made by the wife through housework, for purposes of determining ownership of immovable property instead of continuing the archaic test of actual financial contribution. It is unfortunate that absence of a settled and definite law for ascertaining the respective property rights of the spouses, when marriage terminates by divorce could not be a cause of concern either for the jurists or for the legislatures of this country. The seriousness of this lacuna may be highlighted by contemplating a situation where a housewife who, though educated and capable of earning, has been busy in maintaining and running the household carefully so that husband could go out for work and earn money for the family, finds on divorce that she has nothing to share in the household assets with which she had been associated for many years.

1.4 Legal Provisions Dealing with Settlement of Spousal property in India

The Indian matrimonial law has, so far paid hardly any attention to the economic aspect of family law. On the other hand, the English matrimonial law has, during the last six decades, made considerable studies and the law of property as it affects the spousal relationship has been simplified and brought in harmony with the modern social conditions. The development has been from wife's status as subservient member to an equal head of the family. Based as it is on the then English law, the Indian Divorce Act, 1869 contains provisions for the settlement of spousal property and financial settlement. It stated that whenever the court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, and it is made to appear to the court that the wife is entitled to any property, the court may if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage or of both.[42] The provision appears to be penal in nature. Since, it provides for the settlement of the property of the wife who is found guilty of adultery. In case the husband has recovered some damages from the co- respondent the court may direct that the whole or any part of damages shall be settled for the benefit of the children of the marriage or as a provision for maintenance of the wife. Pursuant to its order for the settlement of wife's property, the court may also order for the execution of an instrument for that purpose.

---

41 Raj Kumar, *Women and Law*, Anmol Publications, New Delhi (2000), p. 13.

42 The *Indian Divorce Act*, 1869, S. 39.

Another provision states that the High Court, after a decree absolutely for the dissolution of marriage, or a decree of nullity of marriage and the District Court after the decree for the dissolution of marriage, or of nullity of marriage has been confirmed, may enquire into the existence of anti-nuptial or post-nuptial settlement made on the parties whose marriage is the subject of the decree and may make such orders with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife or of children (if any) of the marriage or of both children and parents, as the Court deems fit,[43] provided that, the court shall not make any order for the benefit of the parents or either of them at the expense of the children.

The *Parsi Marriage and Divorce Act*, 1936 stipulates for the settlement and disposal of joint property of the spouses. It lays down that in any suit under the Act, court may make such provisions in the final decree as it may deem just and proper with respect to property presented at or about the time of marriage which may belong jointly to both the spouses. This provision is limited to the joint properties presented to the parties at or about the time of marriage and does not relate to their separate properties. It has no relation to the questions of title of property or to matters arising between the spouses as owners or joint owners of property.[44] In *Banoo Jal Daruwala v. Jal C. Daruwala,*[45] it was held that the matrimonial court constituted under the Act does not deal with the question of the titles to properties and questions arising between a husband and a wife as co-owner of properties except only in respect of joint properties presented at or about the time of marriage. Similarly in *Nandini Sanjiv Ahuja v. Sanjiv Birsen Ahuja,*[46] the Bombay High Court held that section 42 empowers the court to make provisions with respect to property which may jointly belong to husband and wife and hence the subject matter of an order under this section would only be the joint property and nothing more.

Analogous to section 39 of the Indian Divorce Act, 1869, section 50 of the *Parsi Marriage and Divorce Act*, 1936, lays down a provision for the settlement of wife's property on the ground of whose adultery a decree for divorce or judicial separation has been passed.[47] It may be noted that the Indian Divorce Act, does not lay down the limit up to which the Court may settle wife's property, but the *Parsi Marriage and Divorce Act*, confine it to one-half while, under the former settlement of wife's property may be made for children as well as husband and under the later the settlement can be made only for the benefit of the children.

Analogous to section 42 of the *Parsi Marriage and Divorce Act*, 1936, the *Hindu Marriage Act*, 1955 also lays down that in any proceeding under this Act the court

---

43 *Ibid,* S. 40.

44 The *Parsi Marriage and Divorce Act*, 1936, S. 42.

45 AIR 1964 Bom 124.

46 AIR 1988 Bom 239.

47 The *Parsi Marriage and Divorce Act*, 1936, S. 50 lays downs that in any case in which the Court shall pronounce a decree of divorce or judicial separation for adultery of the wife if it shall be made to appear to the court that – the wife is entitled to any property either in possession or reversion, the court may order such settlement as it shall think reasonable to be made of any part of such property not exceeding one half thereof, for the benefit of the children of the marriage or any of them.

may make such provisions in the decree as it deems just and proper with respect to any property presented at or about the time of marriage which may belong jointly to both the husband and the wife.[48] The two requisites of the above section are- the settlement of property can be made only at the time of the passing of the decree and secondly the orders relate only to the joint property of the spouses which has been presented to them at or about the time of the marriage. The property acquired by the parties before or after the marriage is not within the purview of the section. Moreover, the court is free to make any settlement of the joint property of aforesaid description either for the benefit of any spouse or children. It may distribute the property among the spouses. In either case property must jointly belong to the husband and wife.

Judiciary too differ in its approach from case to case as in *Krishna v. Padma*,[49] the Mysore High Court held that the property which is not presented to spouses at or about the time of marriage, is outside the purview of section 27 of *Hindu Marriage Act*, 1955. Whereas the Allahabad High Court in *Kanta Prasad v. Omwati*,[50] took the view that the section does not exclude the inherent power of the Court to pass a decree with respect to the separate property of the husband and the wife. The Court drew this power from Section 21 of *Hindu Marriage Act*, 1955 which stated that all powers of a civil court available when deciding cases under it. Again a contrary view was expressed by Delhi High Court[51] and Bombay High Court.[52] But in *Sangeeta Balkrishna Kadam v. Balkrishna Ramchandra Kadam*,[53] the wife claimed, among other things, jewellery, furniture and household gadgets purchased with her earnings and asked for their return under section 27. The Bombay High Court exercising its inherent powers ordered the return of these items even though the articles were not strictly within the scope of the section. But it would be far- fetched to interpret the inherent powers as conferring a power to adjust the properties belonging to the husband and the wife.

It may be noted that the committee appointed by the Government of India in 1971 on the Status of Women has recommended that a divorced woman be given 1/3rd of the assets acquired at the time and during the marriage.[54] This recommendation sans any justification as to why she is entitled to get only 1/3rd, besides being vague in respect of the specific properties in which she has to get this share. It is necessary to recognize marriage as an equal economic partnership between husband and wife, and to give weight to the wife's contribution to the acquisition of assets by the husband by suitable legal mechanisms.

The Indian patriarchal system strengthens control over material assets in favour of males and perpetuates stereotyping of roles firming financial dependency of women

48 The *Hindu Marriage Act*, 1955, S. 27.
49 AIR 1968 Mys 226.
50 AIR 1972 All 153.
51 *Shukla v. Brij Bhushan*, AIR 1982 Del 223.
52 *Badri Prasad v. Sanjiv*, AIR 1988 Bom 239 and *Shakuntala v. Mahesh*, AIR 1989 Bom 353.
53 AIR 1994 Bom 1.
54 Report of the Committee on Status of Women in India (CSWI), 1971-74.

on men. An Indian women's assumption of household responsibilities take her nowhere if after spending substantial part of her life in domestic drudgery a broken marital cord forces her to fight for her survival. In absence of evaluation of homemaking as an economic contribution, this important, though un- remunerative work does not translate into wife's right to own material assets in the matrimonial home.[55] In India, Ms. Veena Verma, a member of the Rajya Sabha, made a valiant attempt by introducing a private member's bill in the Rajya Sabha in 1992, namely The Married Women (Protection of Rights) Bill, 1988. Besides, other rights proposed to be given to a married woman (of any denomination) the Bill provide that;

> She shall be entitled to have an equal share in the property of her husband from the date of her marriage and shall also be entitled to dispose of her share in the property by way of sale, gift, mortgage, will or in any other manner whatsoever.[56]

Unfortunately she lacked the benefit of research and knowledge of the subject. It was a solo effort and while her intentions in bringing out the Bill were lauded, the then Government persuaded her to withdraw the Bill stating that it would examine the matter. In India, husband and wife is not one person and there is no community of interests in their respective properties. However, maintaining the separation of properties, it is possible to distinguishing the category of property in which both the spouses have common interests either because of its acquisition through joint efforts or because of an intention to treat a property as common property of both. Matrimonial property law seeks, among other matters, to quantify a spouse's contribution to the marriage in order to ascertain shares at the time of death or dissolution of marriage. Despite the lack of development of this branch of family law in India, other areas of law such as Tort law, Motor Vehicle law and Insurance have made some advances in this direction.[57]

In *Lata Wadhwa v. State of Bihar*,[58] the court was dealing with the monetary value of services rendered by the housewives to the households in order to compute the compensation under the Motor Vehicles Act, 1988. the court was of the view that, " ... taking into consideration, the multifarious services rendered by the housewives for managing the entire family even on a modest estimation should be Rs. 3,000 per month and Rs. 36,000 per annum. This would apply to all housewives between the age group of 34-59 and as such who were active in life...". As far as the elderly ladies were concerned in the age groups 62-72, the value of the services rendered by them to the household was modified by the court to be Rs. 20,000 per annum with the appropriate age specific multiplied as provided in the Act in addition to the conventional sum of Rs. 50,000 awarded in such cases. This quantification of the value of house work performed by woman has been followed in tort cases where there was medical negligence. Compensation amounting to Rs. 6, 12,000 was ordered to be recovered by the State from the negligent doctors in *Sobhag Mal Jain v. State of*

---

55 Poonam Pradhan Saxena, "Hindu Law," *Annual Survey of Indian Law*, Vol. XLII, 2006, pp. 394-395.

56 The Married Women (Protection of Rights) Bill, 1994 (Bill No. XXV of 1994), S. 3(3).

57 Kamala Sankaran, "Women and Law," *Annual Survey of Indian Law*, Vol. XLII, 2006, pp. 610-611.

58 AIR 2001 SC 321.

Rajasthan.[59] In an earlier case where high intensity electricity lines snapped leading to death of a person, the rule of strict liability was held to apply.

In *Surjya Das v. Assam State Electricity Board*,[60] where such an accident happened and the petitioner's wife was electrocuted, the Gauhati High Court computed the quantum of compensation taking her earning's to be about Rs. 1500 per month, she being a daily wage earner. This was done without any reference to the minimum wages fixed in the State in 1999 when the accident took place. It is disappointing that the Court nowhere explains the basis on which it arrived at this figure. It must be pointed out that in cases where women are earning, their contribution to the household work should also be taken into consideration, as a separate factor apart from the loss of loss of earning while computing compensation.

The husband and wife are treated as one person for purpose of income tax under the Income Tax Act, 1961 and similar provisions are available also in the Wealth Tax Act, 1957 and Indian Contract Act, 1872. Thus, despite separation of properties, marriage creates in one way or the other, some interest of the spouse in the properties of the other. In view of the common interest principle, it could be suggested that matrimonial property may include all the acquisition which are either the product of joint participation of both the spouses or have been acquired with the intention of their common use. Thus, all acquisitions during the course of marriage may be termed as 'matrimonial property' except:

i. Properties earned or acquired by each spouse before the marriage.

ii. Properties which accrued to each through gift, will or inheritance during the course of marriage.

iii. Separate earnings of the spouses by way of salaries wages, gains of professional work or income from any independent business, subject to the liabilities necessary and incidental to the maintenance of household and subject to the liabilities towards the children.[61] The above mentioned properties would continue to be the separate and exclusive property of the spouse concerned and cannot be subjected to division.

In year 2012, The Centre has approved path breaking amendments to the *Hindu Marriage Act*, 1955. The meeting of the Union Cabinet chaired by Prime Minister Manmohan Singh approved the redrafted Marriage Laws (Amendment) Bill, 2010. The Marriage Laws (Amendment) Bill-2010, was introduced in the Rajya Sabha two years ago and then referred to the Parliamentary Standing Committee on Law and Justice. Taking up amendments to the Marriage Laws Amendment Bill, 2010, a clear provision has been made in the law that an equal share i.e., 50 per cent in the residential property of a man, whether acquired before or after the marriage, will go to his wife and children in case of divorce. The wife will have to move an application seeking the share. Not just that, the Cabinet further amended the Bill by granting women and children rights in the movable assets of the man in case of a divorce.

---

59 AIR 2006 Raj 66.

60 AIR 2006 Gau 59.

61 *Supra* note 36 at p. 62.

Instead of fixing the quantum of share of women and children in movable assets, the cabinet decided to let the courts of law decide the share.[62] The ministers felt that a judge could decide on the quantum of compensation after taking into account an entire set of considerations such as the disposable income of both husband and wife, conditions like who will bear the primary responsibility of raising the children and claimants on the "inheritable property."

But the proposal to give a woman share in "inheritable" property had run in to rough weather because of a conflict of opinions within the government. While the Law ministry had proposed an equal share in both inherited and inheritable property, the Ministry of Women and Child development (WCD) had expressed concern over the implementation of the decision. Faced with conflicting views the cabinet had referred the matter to the Group of ministers (GoM) whose recommendations to leave the final decision with the judge has been accepted and hence the proposed equal share in residential property was taken back. This was for the first time in the history of marriage laws in India, women and children have been given definite rights in the residential property of men in the event of a divorce.

On 26th August 2013, in a major step towards making marriage laws more women-friendly, Rajya Sabha passed the bill to amend the *Hindu Marriage Act* (1955) and the *Special Marriage Act* (1954) that provides for "irretrievable breakdown on marriage" as a ground for divorce as well as grants women the right to a share in the property of their husbands. The Marriage Laws (Amendment) Bill, 2013, will of course also have to be passed by Lok Sabha before it can become law. According to the Marriage Laws (Amendment) Bill 2013 as passed in Rajya Sabha, the courts would decide the "extent" of the wife's share in her husband's self-acquired property, both moveable and immoveable, in case of a divorce. While the wife will have no share in inherited property, its value will be taken into account by court while fixing the amount of compensation or alimony to her.[63]

1.5 Critical Appraisal

No doubt the Hindu Laws (Amendment) Bill 2013 talks about such compensation to wife which shall include a share in his husband's share of the immovable property (other than inherited or inheritable immovable property) but specific mention of share in matrimonial home is a gross omission. A very practical and a serious problem that a wife faces, after her divorce is that, she is rendered homeless and

62 The Tribune dated 24th March 2012.

63 The Marriage Laws (Amendment) Bill, 2013 (As passed by The Rajya Sabha), S. 13 (F)- Special provision relating to share in immovable and movable property in proceedings under section 13C: (1) Without prejudice to any custom or usage or any other law for the time being in force, the court may, at the time of passing of the decree under section 13C on a petition made by the wife, order that the husband shall give for her and children as defined in section 13E, such compensation which shall include a share in his share of the immovable property (other than inherited or inheritable immovable property) and such amount by way of share in movable property, if any, towards the settlement of her claim, as the court may deem just and equitable, and while determining such compensation the court shall take into account the value of inherited or inheritable property of the husband. (2) Any order of settlement made by the court under sub-section (1) shall be secured, if necessary, by a charge on the immovable property of the husband.

shelter less. There is no provision enabling her to continue to stay in the matrimonial home. In such circumstances, a very vital issue is where does a woman do after divorce? Thus, the solution to this problem is that she be given half the share in matrimonial home, in addition with the quantum of share given at the discretion of Court. Many women organizations are demanding that every kind of spousal property should be divided between the spouses in the event of divorce. But it may be noted that in Indian context some issues are needed to be considered before widening the horizon of Amendment Bill to every kind of spousal property: The government clearly is not concerned about the justification of how to give property rights to a woman who probably did not even stay at husband's house and filed for divorce after 3-4 years, *vis-a-vis* a woman married for 20 years with the couple having children. The Bill aims to give married women rights in husbands' property in case of a divorce, but there is no mention of the case if the wife also has property and she is the one who initiates divorce. Irrespective of the fact who owns more property and who initiates divorce, the wife is supposed to have rights whereas, the husband has none. Should a husband be entitled to similar rights or not? Moreover if the parties live together without marriage for a long period and later on the man throws the woman out, should she be entitled to relief? The division of matrimonial property in case of divorce is left to discretion of courts. It is of course an interesting point that if the courts take 7-10 years to exercise discretion as of now in matrimonial cases, how many years will be added in disposing of the cases by the additional opportunities of discretion being given to courts.

IRRETRIEVABLE BREAKDOWN OF MARRIAGE : A REMEDY FOR EASY SEPARATION

Dr. Reetika Bansal*

1.1 Introduction

Marriage forms the very basis of social organisation. The *Hindu Marriage Act*, 1955 actually regards marriage as a sacrament which is eternal in it's being. Without the basis of the institution of marriage, the society cannot exist at all and will hence, have no civilisation.

The foundation of a sound marriage is tolerance, adjustment and respect for each other. Tolerance towards each other's fault, to a certain bearable extent, has to be inherent in every marriage. Petty differences should not be exaggerated or magnified to destroy what is said to have been made in heaven.

'Divorce' is the "Dissolution of a valid marriage in law". Once a divorce is granted, the parties are free from any kind of obligation, legal or otherwise, towards the other party. As per the religious point of view divorce *per se*, was not recognised as a means to put an end to the marriage, which was always considered to be of sacred nature.

1.2 Meaning and Definition of Irretrievable Breakdown of Marriage

Irretrievable breakdown of marriage can be defined as such failure in the matrimonial relationship or such circumstances adverse to that relationship that no reasonable probability remains of the spouses remaining together as husband and wife for mutual comfort and support. It is the situation that occurs in a marriage when one spouse refuses to live with other and will not work towards reconciliation.[1] In other words, when there is no hope that parties can be reconciled to continue their matrimonial life, the marriage can be considered as irretrievable breakdown of marriage.

The *Hindu Marriage Act*, 1955 and the *Special Marriage Act*, 1954, at present, has existing grounds of divorce, as mentioned in section 13 and 27 respectively. In addition to those grounds, and keeping at par with the changing times, irretrievable breakdown of marriage was suggested, which ought to be made a ground for dissolution of marriage.

1.3 Historical Development of the Concept of Irretrievable Breakdown of Marriage

The germ of the breakdown theory was first introduced in New Zealand. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a

---

* Assistant Professor in Maharishi Markandeshwar University, Mullana, Ambala – 133 203.

1 Paras Diwan, *Hindu Law* (2005), 2nd Ed. at p. 563.

ground for making a petition to the court for divorce and the court was at discretion whether to grant divorce or not.[2]

In England, this theory was recognised in case of *Masarati v. Masarati*,[3] where both the parties to the marriage had committed adultery. The Court of Appeal, on wife's petition for divorce, observed breakdown of marriage. According to the reports of Law Commission of England, the objectives of good divorce law are twofold: one is, to buttress and second is, when regrettably marriage has broken down, to enable the empty shell to be destroyed with maximum fairness, and minimum bitterness, humiliation and distress.[4]

In 1969, the General Assembly of the Church of Scotland accepted the Reports of their Moral and Social Welfare Board, which suggested the substitution of breakdown in place of matrimonial offences. According to this Report:

> "Matrimonial offences are often the outcome rather than the causes of the deteriorating marriage. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown."[5]

The Matrimonial Causes Act, 1959 of the Commonwealth of Austria provided for the divorce on the ground of marriage. In India, breakdown of marriage is still not ground of divorce in spite of the recommendation of the Law Commission and various Supreme Court judgments to include breakdown of marriage as a ground for divorce.[6]

So, once the parties have separated and the separation has continued for a sufficient period of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, than divorce should be granted.

These are the main postulates of the theory of irretrievable breakdown as a ground of divorce.

1.4 Theories of Divorce

Broadly, theories of divorce can be classified under two heads, i.e.; firstly, divorce on the ground of fault; secondly, divorce on the ground of no fault or breakdown theory of divorce.

The theory of fault is one of the principal theory adopted in the *Hindu Marriage Act*, 1955 and in the other theory of breakdown, the basic principle is frustration of the marital relationship by supervening circumstances of the specific nature.

---

2 *Ladder v. Ladder*, 1921 New Zealand Law Reports, p. 876.
3 *Supra* note 1 at p. 29.
4 *Ibid.* at p. 564.
5 Seventy First Report of the Law Commission of India.
6 *http://www.Legal Services India.Com*, visited on 30th April, 2013.

According to *Hindu Marriage Act*, 1955, there are three categories of grounds of divorce. These are:

1. **Traditional Theory of Matrimonial Fault**: This is the principal theory adopted in the *Hindu Marriage Act*, 1955. The legally recognised grounds of divorce under this theory are adultery, cruelty, and desertion[7] and (on wife's petition) bigamy, certain sexual offences and failure to pay maintenance.[8] However, the most striking feature and drawback is that if both parties have been at fault, there is no remedy available.
2. **Theory of Frustration by Reason of Specified Circumstances**: This is the second ground for dissolution of marriage. There may arise circumstances which, though not constituting fault on part of any party, render dissolution of marriage necessary since, by reason of these supervening circumstances which do not amount to matrimonial fault, a material change is introduced. Examples of this theory are: conversion of the other spouse,[9] insanity,[10] diseases,[11] renunciation of the world by the other spouse,[12] absence of the other spouse for a long period.[13]
3. **Theory of Consent:** This is the third category of divorce. Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals. When the consent given to the marital relationship is revoked without necessity of showing fault or other supervening circumstances then the cause of action arises. This theory is accepted under section 13 B (divorce by mutual consent) of the *Hindu Marriage Act*, 1955. The rationale behind this theory is that since two persons can marry by their free will, they should also be allowed to move out of their relationship of their own free will. However, critics of this theory say that this approach will promote immorality as it will lead to hasty divorces and parties would dissolve their marriage even if there were slight incompatibility of temperament.

It may further be added that divorce is also granted on the basis of what may be called 'securing conformity with the legal system'. Where a marriage does not, in certain respects, comply with the requirements laid down by the law, the legislature, in its wisdom may allow the grant of divorce, instead of a provision for nullifying the marriage.[14]

There is, however, no theory of breakdown of marriage, in the sense in which it is understood in modern times. Irretrievable divorce is to be granted only if the marriage has actually broken down. Justice Om Parkas of Delhi High Court for the

---

7 S. 13(1) (i), (ia) and (ib), The *Hindu Marriage Act*, 1955.
8 *Ibid,* S. 13(2)(i), (ii) and (iii).
9 *Ibid,* S. 13 (1)(ii).
10 *Ibid,* S. 13(1)(iii).
11 *Ibid,* S. 13(1)(iv) and (v).
12 *Ibid,* S. 13(1)(vi).
13 S. 13(1)(vii), *Hindu Marriage Act*, 1955.
14 For example, if the divorce is granted (at the instance of the wife) on the ground that the age of the wife was below the statutory minimum at the time of the marriage. (S. 13(2)(iv), *Hindu Marriage Act*, 1955.

first time in *Ram Kali v. Gopal Das*,[15] took note of the modern trend not to insist on the maintenance of a union which has utterly broken down, and observed:

> "It would not be practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the façade of marriage even though the rift between them is complete and there is no prospect of their ever living together as husband and wife".

1.5 Legal Aspect of Irretrievable Breakdown of Marriage:

For the convenience of the study this aspect of irretrievable breakdown has been divided under two heads:

(a) Present position under the *Hindu Marriage Act*, 1955.

(b) Need for inclusion of the law relating to Irretrievable breakdown of Marriage.

1.5.1 Present position under the Hindu Marriage Act, 1955

Under the *Hindu Marriage Act*, 1955 both the husband and the wife have given the right to get their marriage dissolved by a decree of divorce on more than one ground specifically enumerated in Section 13.[16] In the year 1964 sub section (1-A) was inserted by which either party to the marriage was also given a right to apply for dissolution of marriage by a decree of divorce either where there has been no resumption of cohabitation for a period specified there in, after the passing of the decree for judicial separation, or where there has been no restitution of conjugal rights for the period specified there in after the passing of a decree for restitution of conjugal rights.

Apart from this in sub section (2) of section 13, certain addition grounds are laid down in this behalf which can be made use of by the wife only.[17] In the year 1976 the legislature has inserted section 13-B to provide for divorce by mutual consent after living apart for one year and they have not been able to live together and they have

---

15 1971 ILR 1 Del 10(FB).

16 For example, (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; (ii) has, treated the petitioner with cruelty; (iii) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; (iv) has ceased to be a Hindu by conversion to another religion; (v) has been incurably of unsound mind, or from mental disorder of such kind and to such an extent that petitioner cannot reasonably be expected to live with the respondent; (vi) has been suffering from virulent and incurable form of leprosy; (vii) has renounce the world; (viii) has not been heard of as being alive for a period of seven years or more.

17 The wife may also present a petition for dissolution of her marriage on the ground that (i) the marriage was solemnized before the commencement of the Act and that, the husband had married again before such commencement ; (ii) that since the solemnization of marriage , he is being guilty of rape, sodomy or bestiality; (iii) that a decree or order for maintenance has been passed against the husband notwithstanding that the wife was living apart and that since the passing of the decree or order, cohabitation between the parties has not been resumed for one year or upwards; (iv) that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and that she had repudiated the marriage after attaining the age of 15 years, but before attaining the age of 18 years.

now mutually agreed for the dissolution of the marriage. In this case, the law requires a joint petition by both parties.

It is thus clear that the legislature has been conscious of the social developments and the need for making available the remedy for divorce in more and more situations.

1.5.2 Need for Inclusion of the Law relating to the Irretrievable Breakdown of Marriage

However, it is to be noted from above that none of the grounds made available for seeking divorce by either the husband or the wife, speak of irretrievable breakdown of marriage as a ground of divorce.

The basis for introducing irretrievable breakdown as a ground of divorce is that it causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked.

The marriage has all the external appearances of marriage, but none of the reality. It is merely a shell out of which the love, affection and care has gone. In such circumstances, there is hardly any utility of maintaining the marriage, when the emotional and other bounds which are of the essence of marriage have disappeared.

After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides for fulfilment which they seek. Divorce should be given as a solution and an escape route out of a difficult situation.

Today's wife is not ready to merely live at the mercy of her husband and the members of his family. A sense of confidence and self respect has come to be instilled in the wife in view of advanced socio-economic conditions. The wives are ready to face challenges in life. They are keen to become self- dependent. They are now prepared to live separately rather than to stay united while unhappy.

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can wall be presumed that the marriage has broken down. The courts, if it is found that the breakdown is irreparable, should grant divorce.

1.6 Irretrievable Breakdown of Marriage and the Role of Judiciary

A marriage may be treated as irretrievably broken down if cessation of cohabitation has taken place for a period of two years or more. History is the evidence to show that there were innumerable cases when marriage was utterly broken, but in some cases, the courts did stick to the letter of the law, and thus because of being tied by the technicalities of the law, could not give meaningful relief to the parties,[18] and yet we can find certain cases where the court did grant divorce, through interpretation of the law, in spite of any particular law allowing the same. The Apex court in *Kanchan*

[18] *N.G. Dastane v. S. Dastane*, AIR 1975 SC 1534.

Devi v. Pramod Kumar Mittal,[19] took recourse of Article 142 of the Constitution and dissolve a marriage on the ground that the marriage has irretrievable breakdown. A.S. Anand and Faizan Uddin, JJ of Supreme Court observed that:

> We in the exercise of our powers under Article 142 of Constitution of India, here by direct that marriage between the appellant and respondent shall stand dissolved by a decree of divorce, since there appears no hopes of reconciliation in the parties in question.

Similarly, the Bombay High Court in *Madhukar Bhaskar Sheorey v. Saral Madhukar Sheorey*,[20] held that the enactment of section 13(a) of *Hindu Marriage Act*,1955 is a legislative recognition of the principle that is in the interest of society, if there has been a breakdown of the marriage; then there is no purpose in keeping the parties tied down to each other. It would not only be injurious to the peace of the society, but also in the future relations of the parties.

Of late, however, the courts have been adopting a more realistic view to deal with the cases. They are adopting more liberal and practical approach and several judgments[21] of the different courts, prove the fact that they no longer stick to the traditional notion of the inviolability of the marital tie.

One of the cases relating to irretrievable breakdown of marriage is *V. Bhagat v. D. Bhagat*,[22] Jeewan Reddy and Kuldeep Singh JJ. Of Apex Court observed that, irretrievable breakdown of marriage is not a ground by itself. But while ascertaining the evidence on record to determine whether the ground alleged are made out and in determining the relief to be granted, the said circumstances be borne in mind .The Supreme court observed that:

> It would indeed be a matter of serious concern, if both, the law and the courts fail in taking notice of the miseries of the parties, since the long continuous separation itself reflects the irreparable status of relations between the couple, and marriage, subsisting as a formal bond is an empty formality, which ultimately undermines the essence and significance of marriage as a social institution and provides enough scope for unimaginable crimes within four walls of the house![23]

Again the Supreme Court in *Naveen Kohli v. Neelu Kohli*,[24] has once again made a strong plea for incorporating irretrievable breakdown of marriage as a ground of divorce. The three judges bench of Supreme Court namely, Bhandari, B.N. Aggrawal, and A.K. Mathur, JJ. After analysing in great detail the facts and circumstances of the case, along with various decisions on such attitude of parties amounting to mental cruelty, and also the appropriate law on issue, dissolve the marriage. It was held that:

---

19 (1996) 3 SCALE 293.

20 AIR 1973 Bom 55.

21 *Ajay Sayaji Rao Desai v. Rajshree Ajay Deasai*, AIR 2005 Bom 270*; Ashok Hurra v. Rupa Bipin Zaveri*, (1997) 4 SCC 226; *Chandrakala Trivedi v. Dr. S.P. Trivedi*, (1993) 4 SCC 232.

22 AIR 1994 SC 710.

23 *Ibid.*

24 AIR 2006 SC 1675.

> Once the marriage has broken down beyond repair, it would be unrealistic for the law, not to take notice of the fact, and the forcibly continued marriage would only act as a detriment to the future of the parties involved.

According to Dr. A.R. Lakshmanan and Tarun Chatterjee JJ. Of Supreme Court, if after examining the facts and circumstances of the case it will not be possible for the parties to live together, and if no purpose is solved in compelling both the parties to live together, the best course was to dissolve the marriage by passing a a decree of divorce so that the parties who were litigating since 1981 and had lost valuable pare of life could live peacefully in remaining part of their life.[25]

1.7 Conclusion and Suggestions

It is true that marriages are made in heaven and broken on earth, hence appropriate care has to be taken to see that such marriages are not broken easily. Just as every coin has two sides, the possibility that the insertion of a new ground of divorce will be misused cannot be set aside, but at the same time, there is a need to look at the bigger picture and to protect the interests of the parties suffering, but unable to get divorce because of the technicalities of the law. To prevent a few bad things from happening, the law should not hinder the needs of the larger lot. Justice V.R. Krishna Iyer in *Aboobacker v. Manu*,[26] stated that:

> While the stream of life, lived in marital mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds break up the flow of stream. Thus, is crystal clear that when the relationship is not going good and unnecessary maintained on papers where the feelings of trust, love does not exist and no scope of recovery of relationship is there it is better to end the relationship, incompatibility is often a major reason for unhappiness. When friends can end their relationship, why can't a couple? However, a safety clause can be inserted which would empower the courts to refuse divorce if it is adversely affects the interest of children and a provision should be made for the maintenance for child and wife. It should also include the maintenance of husband and children by the wife because in the changing scenario it's no more that women sits in four walls of the house even she is incompatible enough to meet the expenses of the family and have a full right of maintenance of her own child.

Moreover, in India, divorce was considered as an evil and it was very limited which sought only under compelling circumstances. By including such clause of irretrievable it would be a shame and unjust on the part of the country where relationship are given the first preference and it would be just to adopt an another theory of westernization. So, courts should not grant the decree of divorce until and unless, adequate provisions for maintenance of children and wife are made, keeping in mind the financial soundness of the parties to the marriage.

Some suggestions are being proposed for the better implementation of the provisions relating to irretrievable breakdown of marriage:

---

25 *Rishikesh Sharma v. Saroj Sharma*, (2006) 12 SCALE 282.

26 AIR 1971 KLT 663.

1. If the relationship between the parties is not going pleasant and the gap is increasing owing disliking, bitterness and hatred and if the courts are satisfied that there is justified grounds for granting divorce the courts must pass an order for divorce after making due provisions for alimony of wife and children.
2. The second suggestion is where the parties are making default in paying the amount of maintenance then the amount of maintenance should be deducted from the husband's salary, if the husband is employed in Government or in public or private sector. The question regarding the amount of maintenance which is to be deducted from husband's salary is at least $1/3^{rd}$ of the salary which is to be deducted in lieu of maintenance.
3. If the husband is self-employed, provisions should be made for maintenance, with the State as a party, for the protection of the deserted family.
4. In another case where the men employed overseas, enter into dubious or deceptive marriages with women in India. Such men, if disclaims the wife after marriage and the deserted wife is left without any provision for her livelihood or maintenance. It is suggested that in order to overcome this deficiency, the husband should make a declaration of assets and provide at the time of marriage, for the wife's maintenance.
5. Next important suggestion is regarding the date from which the liability to pay should arise. It is submitted that liability to pay should arise precisely from the date when the duty to pay maintenance is violated and the date of omission or neglect to maintain a spouse or child in distress should, therefore, be the criterion in this regard.

Analysing the various provisions regarding the irretrievable breakdown of marriage, the suggestions being discussed above if applied and enforced can prove to be beneficial for the proper implementation of the law because it is truly said " justice should not only be done but it seems to be done."

REVISITING INTANGIBLE PILFERING IN CYBER AGE

Shiva Satish Sharda*

> The medium, or process, of our time-electronic technology-is reshaping and restructuring patterns of social interdependence and every aspect of our personal life. It is forcing us to reconsider and reevaluate practically every thought, every action, and every institution formerly taken for granted.
>
> — Marshall McLuhan

1.1 Introduction

It's not about picking a pocket or holding up a bank, it's robbing people of their ideas, inventions, and creative expressions—what's called intellectual property—everything from trade secrets and proprietary products and parts of movies and music and software.

The concept of Intellectual Property Rights emerged as a public policy device relative to social, economic, and political forces and sculpted by a particular technology, the printing press. It has been realized in various international documents.[1] It's a growing threat—especially with the rise of digital technologies and Internet file sharing networks. And much of the theft takes place overseas, where laws are often lax and enforcement more difficult.[2] The theft of trade secrets and infringements on products can impact consumers' health and safety.

Intellectual property consists of a bundle of rights which may be violated by committing software piracy copyright infringement, trade-mark and service-mark violations, theft of computer source code etc.[3] Internet being the fastest telecommunication and information system, it has become a most convenient media to conduct business transactions. The explosion of digitalization and the internet have further facilitated the intellectual property right violators to copy and illegally distribute trade-secrets, trade-marks, logos theft of computer source code etc. Computer pirates steal away valuable intellectual property when they copy software music, graphics/pictures, books, and movies etc. which are available on the Internet.[4]

---

* Assistant Professor of Law, Army Insitute of Law, Mohali.

1 The Paris Convention for the Protection of Industrial Property, 1883, Article 1, *the protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.* Berne Convention, 1886, World Intellectual Property Organisation, 1967.

2 Annmarie Levins, The Global Threat of Software Piracy, *International Criminal Police Review,* Official Publication of International Criminal Police Organization, ICPR 476-477/1999. *www.interpol.int.*

3 Rosenberg, Matt., Copyright Law Meets the World Wide Web, retrieved from *http://www.unesco.org/culture/laws/copyright/htmleng/pageon* 24 Feb, 2012.

4 "Counterfeiting and Theft of Tangible Intellectual Property: Challenges And Solutions" Written Testimony of Timothy P. Trainer, President International Anti Counterfeiting Coalition, Inc. (IACC) Before the United States Senate Committee on the Judiciary Washington, D.C. March 23, 2004. *www.iacc.org.*

The growing role of information, and the vast structural changes affected the metamorphosis from an industrialized to an informational world. The information revolution is the first self-aware social revolution in the history of humanity. As our society continues its transformation into an information society, it is particularly crucial that we deal successfully with new demands on Intellectual Property policy. The present research paper imbibes the idea of required vitality in the legal protection accorded to Intangibles specifically when misappropriation is done at the level of intangible in the ephemeral. Indian legal and judicial juxtaposition has been analyzed in the context of despoiling intangible: intrinsic paradigm.

Through Intellectual Property we define how information, the primary resource of the new Era, will be conceptualized and realized, whether it should be considered an economic commodity or a societal resource.[5] The central objective of any business is profit. The assets of the company include the resources available with the company and help it determine its valuation and the future business. The assets are classified as tangible assets like buildings, infrastructure, equipments and the like. Intangible assets are nonphysical resources and rights that have a value to the organization.[6] The intangible assets offer the potential for certain rights and privileges as well as the possibility for economic benefits to the organization. The intangible assets include brand reputation, franchisees, human capital, goodwill, consumer sentiments and the like.[7]

The rapid acceleration of technological development, and the novel nature of the change it initiates, poses serious problems for the traditional system. Such changes, for example, have created new interest groups and motivated old interest groups with new, but valid and important, claims.[8]

The traditional Intellectual Property owners are concerned with how their works will be protected and in what ways creation and distribution will be restructured. Artists, publishers, producers, and distributors call for stronger enforcement of their rights in an age of easy, quick, and perfect copy technology. On the other hand, the newly created industry of information processors like database producers, information analysts, or music sample artists who re-compile and re-create existing information for new and novel purposes, oppose restrictions. They argue that though they use existing creations, by recompiling them, they are creating a new, adding value to the information, and therefore deserve profit as well.[9]

---

5 "The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings... but on the grounds that the welfare of the public will be served and progress of science and useful arts will be promoted.." - Excerpt from the 1909 *Copyright Act.*

6 How to tackle counterfeiting in India, Ranjan Narula & Taj Kunwar Paul Rouse & Co International, Managing Intellectual Property, Euromoney Institutional Investor plc, February 2004.

7 *IbIbid,* Inc. (IACC) *www.iacc.org.*

8 *Ibid.*

9 The *Copyright (Amendment) Act*, 2012, S. 13(1) of the Act says that copyright shall subsist in original literary, dramatic, musical and artistic works, cinematograph films and sound recording. Under the Act, an artist is the owner of the copyright of an artistic work because he creates it. Producers took over the rights by virtue of S. 17(b), which says that the author of a work shall be the first owner of the copyright "in the absence of any agreement to the contrary"

In examining the changing environment in relation to Intellectual Property policy, there are three areas of particular interest. Firstly, because rights are only as valid as they are enforceable, we must consider how issues of enforcement affect the Intellectual Property system. Also, since Intellectual Property policy reflects a balance between the market place, the creator, and the public, we must consider how the Information Era affects the marketplace and the process of creation with respect to the public good. Finally, we must clarify what information really is and how best to "work with it" in its new environment.[10]

1.2 Enforcement Issues in Information Era

Information Era technologies pose serious threats to the enforcement of Intellectual Property rights. Technology is making the reproduction and manipulation of information cheaper, faster and more private. Hence, intellectual theft becomes more trivial and Intellectual Property rights less enforceable.

Traditional Intellectual Property was enforceable because to make money on an idea, one had to transfer one's idea into a tangible product, the exchange of which could be enforced in the marketplace. A book, for example, required a printing press, not a trivial investment, and lent itself to attaching author and publisher names and copyright symbols. New information and communication technologies however, are changing situation. Cheap, easy-to-use technology makes duplication, cutting and pasting, and mass, private distribution a simple matter.[11]

Today's computer and media networks combined with home recording devices not only make Intellectual Property "theft" child's play, but they cause consumers to doubt the very legitimacy of Intellectual Property claims. Though "private use" is different from "pirate use" in that private use is not a commercial activity in direct market competition at the expense of the creator, when considered in total, the private use of the many might have the same effect as pirate use: creators might lose their financial incentive to create.[12]

Cheap, powerful, and simple technological tools are making the artist a major player in the economics of ideas. No longer is artistic compensation dependent on the huge institutionalized publishing and distributing system typical of the past. Information Era technologies allow artists to produce a finished work of high quality with little technical prowess or capital investment. Further, aside from being able to produce professionally, the artist can also publish and distribute using electronic networks that transmit text, sound, or images.[13]

The swiftly evolving creative environment, both the processes of creation and changes in the social role of creators, also challenges traditional notions of

---

10 World Intellectual Property Organisation, *Intellectual Property on the Internet: A Survey of Issues,* Geneva, 2002, p. 58.

11 David Vaver, Lionel Bentley (Ed.), *Intellectual Property in the New Millennium: Essays in the Honor of W.R Cornish,* Cambridge University Press, Cambridge (2004), p. 79.

12 Rosenberg, Matt., "Copyright Law Meets the World Wide Web", retrieved from *http://www.unesco.org/culture/laws/copyright/htmleng/pageon* 24 feb, 2012.

13 *Ibid.*

Intellectual Property. In this new environment fluidity and interactivity have become increasingly important and will affect the relationship between incentives, creators, and creations. Such changes have important implications on Intellectual Property policy.

1.3 "Information" and data dichotomy

One of the major flaws of the traditional Intellectual Property system in the Information Era stems from its definition of information itself. As information becomes freed from tangible shells such as books or widgets, it poses serious challenges to the traditional Intellectual Property system, which is based on the assumption that ideas are solidified in tangible products.[14] The beauty of Madison's "convenient coincidence" was that the Intellectual Property system was less about ideas as it was about tangible products.[15] A creator got paid for his ability to transform an idea into a marketable product. Since ideas and products were realistically inseparable, there was no problem. Ideas, by way of products, could be priced, sold, owned, and hence could be disseminated for the good of the public.[16]

Now, however, intangible information is being freed of its tangible product. In cyberspace, information takes on a more fluid digital form. As this occurs it becomes necessary to understand information in its natural state, rather than as a tangible product, because in its pure form, information has various properties which contradict certain givens of the market and resist commodification.

Unlike "data," information is more of an activity than a "thing"; it is a process which happens in the nexus between minds; it is experienced rather than possessed; it is something that happens "to" you. Hence, the ownership of pure information becomes problematic.

1.4 The Anachronicity of Intellectual Property

If our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do in our minds? And if we can't get paid, what will assure the continued creation and distribution of such work?[17]

It is clear that the demands on Intellectual Property policy are changing. The tools for creating and marketing are changing, the importance of information in economic and social life is changing, demands on enforcement are changing, and the very philosophic givens of the Intellectual Property system are changing. From all sides of the Intellectual Property issue, actors are calling for change. New groups demand

---

14 Priest, Curtiss "The Character of Information", EFF ftp Archive *ftp:pub/eff/ policy/intellectual _property/priest.txt.*

15 Barlow, John Perry "Selling Wine Without Bottles", EFF ftp Archive *fttp://pub/eff/policy/ intellectual property/economy of ideas*

16 Bruce Bugbee, '*Genesis of the American Patent and Copyright Law*' Washington DC Public Affairs Press (1967), p. 64.

17 *Supra* note 14.

proper representation. Software developers argue, for example, that computer programs represent a new class of "functional works" which use information to describe a process as well as implement the process. Though copyright might legitimately cover description of a process, copyright cannot legitimately cover the functional aspect of functional works. Yet, how do you isolate the descriptive aspects and the functional aspects of computer programs? Programs are both symbolic and functional in nature.

Similarly proprietary schemes like pay per view threaten to discriminate against people who cannot afford the services. If information becomes accessible only to the rich, the Information Era will be severely crippled in its ability to better our society. Information, which is crucial to our lives, must remain accessible to all lest we add another weapon to the arsenal of discrimination.[18]

Relying on the market is clearly a dangerous policy decision. Though we must provide incentives for creators and maintain a healthy market, new policy directions may better serve our needs than traditional, anachronistic Intellectual Property policy.

This approach is particularly well suited for a fast changing technological environment in which the basis for rewards are based on performance, rapid product cycles, and market share rather than unenforceable legal protection of tangible products. Information would remain as mobile as possible and policy could adapt more readily than law to changes. Instead of fighting an uphill, and ultimately futile battle against an evolving environment, the government could use policy to stimulate creation and protect against market failure.[19]

The fear that there will be no basis for rewards in the Information Era is based on the misconception that data is the same as information. "Data" is not information. Information is a process. Artists will get paid for what they can do with their data. Such payment includes both monetary compensation and other rewards like a heightened reputation making their services more valuable and desired in the marketplace.[20]

However, the United States has come up with various legislations[21] to cope up intellectual property theft on Internet; as Indian laws are lagging behind in this area. In the past certain uses, such as copying extracts for educational use, and the

---

18 Anselm Kamperman sanders, *Unfair Competition Law: the Protection of Intellectual and Industrial Creativity*, Clarendon Press Oxford, New York (2004), p. 32.

19 Lionel Bentley, Brad Sherman, *Intellectual Property Law*, Oxford University press, New York, 2009 and see generally Bainbridge et al., *The Encyclopedia of Intellectual Property and Information Technology*, 2000, Universal Publications, New Delhi.

20 Frederick M. Abbot, "Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework", *Vanderbilt Journal of Transnational Law*, Vol. 22, No. 4 (1989) as quoted in Rainmaker MIPL study literature, 2009. p. 467.

21 Anti cyber squatting Consumer protection Act, 1999 established a cause of action for registering, trafficking in, or using a domain name confusingly similar to, or dilutive of, a trademark or personal name. The law was designed to thwart cyber squatters who register Internet domain names containing trademarks with no intention of creating a legitimate web site, but instead plan to sell the domain name to the trademark owner or a third party, *Digital Millennium Copyright Act*, 1998.

utilisation of copyright material for research purposes, was frequently legal in certain clearly defined circumstances. DRM[22] halts this use without the explicit agreement (and usually payment to) the rights owner. Furthermore, both the Digital Millennium Copyright Act[23] in the US and the EC Directive[24] on Copyright in Europe explicitly criminalise any attempt to circumnavigate such technical controls even if this is to allow legally sanctioned 'fair use'. These technologies are intended to ensure that digital source material cannot be duplicated, transferred from machine to machine, or even used in many cases, without the express consent of owners. While this is already having some effect on the developed world's software and music markets, the potential impact on the transfer of knowledge to lesser developed countries is severe. However, Indian Intellectual property Protection law with special reference to copyright[25] regimes have come up to combat piracy issues.[26]

Section 63 of the Act, provides that a person infringing or abetting the infringement is liable to imprisonment upto three years and fine, which may extend to two lakh rupees. There is enhanced penalty for second or subsequent conviction.

Section 63-B of the Act further provides that knowingly making use of an infringing copy of computer software on a computer is a separate offence punishable with imprisonment for not less than seven days and may extend to three years, and with fine which shall not be less than rupees fifty thousand and may extend to rupees two lakh.

Usually most material that the pirates or offenders want to copy is protected by the copyright which implies that a person cannot take out copies thereof unless permitted to do so by the copyright owner.[27] It is a punishable offence under the Copyright Right. The question of whether the involuntary, automatic copies made, amounts to the breach of a copyright is a question, on which different jurisdictions may take different views. This demonstrates the difficulty that although the underlying technical process is understood clearly, the legal challenge may remain (to legally define whether a copy right violation takes place or not), Apart from the issue of violation, the questions relating to the nature, meaning, and scope of copyrights

---

22 Digital Rights management Digital rights management (DRM) is a systematic approach to copyright protection for digital media. The purpose of DRM is to prevent unauthorized redistribution of digital media and restrict the ways consumers can copy content they've purchased retrieved from *http://searchcio.techtarget.com/definition/digital-rights-management.*

23 The *Digital Millennium Copyright Act* (DMCA) was signed into law by President Clinton on October 28, 1998. The legislation implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues.

24 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

25 Infringement of copyright is defined in S. 51 of the Copyright Act. It not only gives rise to civil action but also imposes criminal liability. Civil remedies are provided under Chapter XII of the Act whereas penal consequences of 'infringement of copyright are contained in Chapter XIII of the Act.

26 It may be stated that with a view to protecting the computer database under the intellectual property law in India, the *Copyright Act*, 1957, was amended twice, once in 1994 and again in 1999 which is effective from 13th January, 2000.

27 The various acts to which *Copyright Act*, 1957 extends are enumerated in S. 14 of the Act.

rights are not dearly settled in the context of cyberspace. The WIPO itself affirms that a relatively limited attention to the conflict of law solutions in IPR is mainly due to three factors namely (1) the territorial nature of the IPR systems; (2) the need for introducing minimum IPR standards across jurisdiction; and (3) the reliance of IPR system on registration as a means of enabling protection of certain rights (WIPO, 2002). Copyright holders, for example, use a range of new technologies in cyberspace in order to restrict access to their works that could have the potential of denying the fair use, which is otherwise permissible. This set of challenges can be highly technology oriented. Firstly, it should be technically possible to identify the source and access of copyrighted works. Various judicial decisions have laid focus on the issue of infringement of electronic copyrights in India. In *Eastern Book company v. Navin J. Desai,*[28] the reproduction or publication of any judgment or order of a court, tribunal or other judicial authority shall not constitute infringement of copyright of the government in these works. In *Godrej Soaps (P) Ltd v. Dora Cosmetics Co.,*[29] the Delhi High Court held that where the carton was designed for valuable consideration by a person in the course of his employment for and on behalf of the plaintiff and the defendant had led no evidence in his favour, the plaintiff is the assignee and the legal owner of copyright in the carton including the logo.

Jurisdictional aspect: The question of territorial jurisdiction of the court to deal with copyright infringement was considered by the courts on several occasions.

In *Caterpillar Inc v. Kailash Nichani,*[30] The court held that Indian Copyright Act, 1957 makes an obvious and significant departure from the norm that the choice of jurisdiction should primarily be governed by the convenience of the defendant.[31]

In *Exphar SA & Anr v. Eupharma Laboratories Ltd & Anr,*[32] the Supreme Court finally settled the position in this regard. The Court observed that Section 62(2) cannot be read as limiting the Jurisdiction.

(4) Infringement of copyright: A copyright owner cannot enjoy his rights unless infringement of the same is stringently dealt with by the Courts as it has been observed by the Supreme court in R.*G. Anand v. M/S Delux.*[33] "Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case, the Courts should determine whether or not the similarities are on fundamental or substantial aspects of he mode of expression adopted in the copyrighted work with some variations here and here.

These challenges face the copyright industry at a time when the share of copyright in national economies is reaching unprecedented levels. The economic value of the copyright industry in the United States alone is estimated at US$91.2 billion (motion pictures, music and television), according to International Intellectual Property

28 (2001) DLT 403.
29 (2001) DLT 504.
30 S. 62.
31 (2002) DLT 304.
32 Civil Appeal Nos. 1189-1190 of 2004 (Arising out of SLP(C) No. 3551-3552 of 2003).
33 (1978) 4 SCC 118.

Alliance (IIPA).[34] The share of copyright industries currently represents 5.24% of the U.S. gross domestic product, growing more than twice as fast as the rest of the economy, a growth largely attributed to America's strong copyright laws and effective enforcement mechanisms. Similarly, a study of the copyright industries in the MERCOSUR countries reveals that the share of copyright-protected activities in the value added of Uruguay was 6% in 1997, and of Brazil was 6.7% in 1998, accounting in the latter for 1.3 million jobs.[35] This significance gives weight to the copyright industries' search for technical and legislative solutions to protect copyright from digital piracy.

Direct Infringement: Direct infringement is a strict liability offence and guilty intention is not essential to fix criminal liability in case of fulfillment of certain conditions.[36]

The mere fact that a particular cyber transaction may involve networks and nodes across various borders would leave the transaction quite complex. Even if the technological feasibility exists to trace activities related to a copyrighted work to a particular jurisdiction, often there may be no domestic legal provisions addressing cyber IPR issues. Some domestic legal regimes are attempting to bring in their first generation of cyber laws, many of which tend to be general or in some specific areas like recognition and enforcement of electronic transactions. Domestic IPR regimes addressing IPR in cyberspace are relatively limited and often disparity may exist. Similarly, a range of technologies are at the disposal of the public that enable them to easily access copyrighted materials in cyberspace, which often breach the limitations of fair use. The new technology enabled possibilities threaten to tilt the balance traditional copyright regimes aim to achieve.[37]

This is one of the major challenges legal regimes face with regard to the issue of protection of copyrights in cyberspace issues of 'fair use doctrine' and 'implied licensing' are bound to raise debates in case of digital copyrights in cyberspace. Whether linking a copyrighted works online is a fair use and whether the fact that someone has made an IPR work available on the Internet amounts to an implied license etc, are some of the arguments that are bound to arise in dealing with copyrights in cyberspace. A related legal challenge that arises with regard to copyright protection in cyberspace is the need for refining the fair use principles suitable for online context.

Trade-mark is also one of the intellectual property rights that protects the good-will and reputation of traders and businessmen. These marks are intended to differentiate goods of a trader from other traders who are in the same stream of trade or business.

---

34 See IIPA Report by Stephen Siwek, Economists Incorporated, "Copyright Industries in the U.S. Economy: The 2002 Report," at *http://www.iipa.com/pdf/2002_SIWEK_FULL.pdf.* See Tamara Conniff and Craig Linder, "U.S. Intellectual Prosperity," Hollywood Reporter, p. 1 (April 23-29, 2012).

35 See further the "Study on the Economic Importance of Industries and Activities Protected by Copyright and Related Rights in the MERCOSUR Countries and Chile," WIPO and State University of Campinas (2002), available at *http://www.wipo.int/sme/en/index.html.*

36 Ownership of a valid copyright; Copying or infringement of the copyrighted work by the defendant.

37 The fight against piracy and counterfeiting of intellectual property: Prepared by the Commission on Intellectual Property of ICC, Paris and submitted to the 35th ICC World Congress, Marrakesh, 7 June 2004. Retrieved from *http://www.uscib.org/docs/ icc_counter feiting.pdf.*

Passing-off actions are also covered under the Trademarks Act wherein a trader passes off his inferior quality goods in the name of some reputed trader who is selling the same commodity or article. Therefore, if a particular logo is generally associated with and used in relation to product 'A' its use by someone else in relation to product 'B' would be an infringement of Trademark right[38] and an act of passing off these illegal activities are carried on through the use of computers or Internet, it will attract the provisions of the Information Technology Act, 2000.

The provisions of the Information Technology Act, 2000[39] are relevant to understand the relationship between Intellectual Propoerty protection and information technology as suggest the mechanism for infringement.[40]

(a) The amount of gain or unfair advantage, wherever quantifiable,

(b) The amount of loss caused to any person as a result of the default;

(c) The repetitive nature of the default.

Another area which needs to be tightened up relates to protection of author's rights vis-a-vis the assignee or the licensee. There is need to develop a model contract, too, which should also provide protection for the author's rights in the fast changing scenario of electronic publishing, Internet, etc.[41]

---

38 In *Ridiff Communications Ltd. v. Cyberbooth and Rantesh Naliata*, the High Court of Bombay held that a domain name is more than an internet address and therefore, entitled to protection under the *Trademarks Act*, 1957.

39 Section 43 relates to penalty for the damage to computer system.

40 Section 1(2) read with Section 75 of the Act provides for extra-territorial application of the provisions of the Act. Thus, if a person (including a foreign national) violates the copyright of a person by means of computer, computer system or computer network located in India, he would be liable under the provisions of the Act. Some provisions of the Indian Penal Code, 1860 (IPC) may suffice to provide for legal protection for technological measures. Section 23 of the IPC speaks of 'wrongful gain or wrongful loss. This Section may be relied upon in the case of unauthorized access to the 'protected work'. Section 28, which speaks of 'counterfeiting', may be effectively utilized to arrest the copying of protected works.
(b) If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network accesses or secures access to such computer, computer system or computer network or downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected. Thus, a person violating the copyright of another by downloading or copying the same will have to pay exemplary damages up to the tune of rupees one crore which is deterrent enough to prevent copyright violation.

41 Section 79. Intermediaries not to be liable in certain cases.
(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hasted by him. (2) The provisions of sub-section (1) shall apply if (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hasted; or (b) the intermediary does not — (i) initiate the transmission,(ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission;

[Footnote No. 41 Contd.]

In *M/s. Salty am Infoway Ltds. v. M/s. Sifynet Solutions (P.) Ltd.*,[42] the Supreme Court ruled that with the increase of commercial activities on the internet, a domain name is also used as a business identifier. It not only serves as an address for internet communication but also identifies the specific internet site for a specific business or its goods or services. It, therefore, has all the characteristics of a trademark and a passing off action can be based for infringement of domain name right.

The Apex Court held that by adopting a similar and deceptive name 'Siffy' which was phonetically similar to that of the appellant's they had tried to cash in on the appellant's reputation as a provider of internet services, therefore the appellants were entitled to relief. Allowing the appeal, the Court set aside the decision of the High Court and affirmed the decision of the City Civil Court.

Again, in *Yahoo Inc. v. Akash Arora*, the Delhi High Court granted relief to the petitioner Yahoo Inc. who sought injunction against the defendant for using domain name for internet related services. The defendants contended that the provisions of the Trademark Act were not attracted in this case. But the Court ruled in favor of the petitioner and held that though service marks are not recognized in India, the services rendered are to be recognized for 'passing-off' actions. Section 2(o) of the Act was amended to change the definition of the term 'literary work' which now includes computer program (source code as well as object code) and database which are protected under this Act. As a consequential change, Section 14 of the Act is also amended giving exclusive rights to the owners to do or authorise the doing among other things to reproduce or rent a computer database or a computer program.

Significantly, many areas where information technology has an impact have been rendered justifiable by the Information Technology Act, 2000. They include e-commerce, jurisdictional issues, security measures, evidence, e-banking etc.

It may be noted that just as the legitimate business organizations in the private or public sector rely upon information systems for communication or record Deeping, so also the cyber criminal organizations carry on their illegal activities using enhanced cyber space technology.

[Footnote No. 41 Contd.]

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf., (3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or authorize in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

42 AIR 2004 SC 3540.

1.5 Conclusion

Therefore, it is suggested that the strengthening of intellectual-property laws, the growing economic and cultural importance of intellectual-property rights, and a widespread view that such rights are socially desirable, the future of intellectual property remains in some doubt. Intellectual-property rights are threatened principally by the proliferation of technologies that facilitate the violation of trademark, copyright and other intellectual property rights rules. The Intellectual Property Protection and Enforcement Strategies are very important for the companies to adopt and specially the policing of their IP Assets in an online environment.

KHAP PANCHAYATS AND HUMAN RIGHTS VIOLATION IN INDIA

Nancy Sharma*

1.1 Introduction

In a democracy, the role of judiciary is very crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. Our Indian judiciary can be regarded as a creative judiciary. The Constitution of India accords a special and independent place to the judiciary. The judiciary in India has been playing a vital role in Indian democratic system and has been conferred the power of judicial review for the proper enforcement and protection of the fundamental rights. But apart from the formal courts in India, there are various community courts also which are established by the community people itself to decide the various matters dealing within their community. These community courts do not have the legitimate sanction to decide the law and decisions given by them have no legal sanctity in the legal system as it is believed that their functioning has no transparency and are sometimes in conflict with the law .These are the self styled extra constitutional bodies which take upon themselves the power of the courts of law to issue community mandates often in violation of fundamental human rights. These extra Judicial unconstitutional bodies exist in the form of caste panchayats or Khap panchayats. Today the increasing interferences of khap and their efforts projecting themselves as democratic and authoritative body are violating the human right of the individuals in the society.

1.2 Khap Panchayats in India

Panchayat in a village helps in crystallizing and formulating village opinion and it is an agency for maintaining village order and it often reflects the various legitimate changes in the local order.[1] The elders of a village assemble in panchayat to cope with problems internal to the village .But modern political leaders have placed very high importance on village panchayats as a means for grass roots political participation.[2] The Khap and Sarv Khap is a system of social administration and organization in the Northwestern Indian states such as Haryana, Rajasthan Uttar Pradesh since ancient times. Khap is a term for a social - political grouping and a collective patriarchal body and believed to be using its collective strength for repressive ends rather than democratic ones. The Khap panchayats use its power as extrajudicial bodies. These traditional panchayats mobilize a large no of people on the basis of family kin, gotra, caste, community and village including persons from outside the local area.

Some facts[3] of Khap Panchayat are that, a khap panchayat is usually a collective of at least 12 or more village panchayats. Large Khap Bodies such as the Palam one are made of smaller khaps such as the Meham khap which has 24 villages and the Dalal

---

* Assistant Professor, University Institute of Legal Studies, Panjab University, Chandigarh

1 David G.Mandelbaum, *Society in India*, Popular Prakashan, Bombay,Volume 1, 1972, p. 358

2 *Ibid,* at p. 367.

3 Shobharam Sharma, "Honour Killing in India: Need for Deterrent Action", *Lawz,* February, 2011, 15-18 at p. 17.

khap which has 84 villages under it. The Khaps are active in Haryana, Rajasthan, Uttar Pradesh and Punjab states with a sizeable Jat population. There is one sarve khap in the country which includes all the khap panchayats. The Pradhan of each khap is elected in an informal meeting held by the elders of a particular khap. There is no formal election. Jats believe that khaps were constituted during the reign of King Harshvardhan in the seventh century to assist him with managing his empire. The khaps are different from village panchayats, which are legally elected under the Panchayati Raj System. Technically, each village has two panchayats – the legal panchayat and the other, an informal panchayat, whose members go on to represent the village in a khap panchayat.[4]

The assertion of Khap Panchayats to legitimize their role and relevance in dictating social justice based on traditions and customs of the caste system reflect the confrontation between the traditional and feudal hierarchy of power relations and the modern democratic and egalitarian relations .Despite rapid socio-economic and political trans-formation over the years, hierarchy and domination rooted in the caste system has not become irrelevant. Both as a concept and practice, caste retains critical importance in terms of its multiplicity, complexities and dynamics.[5]

1.3 Khap panchayats and Honour killing

Crimes in the name of honour, figure prominently in the legal discourse in South Asia. A mass of literature has documented cases where families and community governance bodies torture, abduct or kill women and men for transgressing the familial codes of honour.[6] The Khap panchayat, like the caste system and joint family systems, is a traditional institution engaged primarily in dispute resolution and in regulating the behaviour of individuals or groups in rural North India. While the smaller issues are taken up by the village panchayats, the Khap Panchayats resolves disputes of wider concern within their operative territory. Sometimes active in the political sphere, they have mainly been confined to social issues. Historically, speaking, the Khap Panchayats are very old. But they attracted the attention of scholars only when the electronic media highlighted their certain decisions which violated the human rights of individuals. These decisions were mainly related to marriages which violated the traditional moral code of conduct, especially the concept of village bhaichara (brotherhood), gotra bhaichara (clan brotherhood) or khap bhaichara (brotherhood of persons belonging to same khap, signifying equality within the khap), which form the basis of community harmony in Indian villages, especially those in northern India. After independence, the authority of khap Panchayats has been challenged by modern institutions of justice such as Courts, which function on the principle of rule of law.[7]

---

4 *Ibid.*

5 M.S. Rana "Honour Killings is Not Caste, Religion-Specific", *Mainstream,* July 16-22, 2010, pp. 21-27.

6 Pratikshe Bakshi, S.M. & Rai, S.S. Ali, " Legacies of Common Law: Crimes of Honour in India and Pakistan", available at *Third World Quarterly*, Vol. 27, No. 7, 2006, pp 1239-1253.

7 K.S. Sangwan, "Khap Panchayats in Haryana: Sites of Legal Pluralism" in Kalpana Kannabiran Ranbir Singh (Eds.), *Challenging the Rules of Law,* 2008, 331-350 at p. 331.

Khap panchayats are constantly in the news these days for their role in the cases of "honour crimes". Most of these crimes consist of marriages which are inappropriate according to local Haryanvi or western Uttar Pradesh society.[8] In India, majority of honour killings happen in North Indian States of Punjab, Rajasthan, Bihar and Haryana.[9] The killing or threat to kill in the name of honour and social ostracism has once again brought caste-based discriminations, hierarchies, conflicts and cleavages in society. To challenge the undermining of caste authority and principle of ascribed status, the caste councils or Khap Panchayats in particular regions of Haryana, Punjab, Uttar Pradesh, Madhya Pradesh and Rajasthan in north India have become active and assertive during the recent past.[10] Love marriages are considered taboo in areas governed by khap panchayats. Those living in a khap are not allowed to marry in the same gotra or even in any gotra from the same village. Many young couples have been killed in the past for defying khap rules. These panchayats impose their writ through social boycotts and fines and in most cases by either killing or focusing the victims to commit suicide. All this is done in the name of brotherhood and honour. In many villages the leader of self-appointed Court has so much power that the police are kept away from village politics. On many occasions, parents kill and dump the bodies of their children in the name of honour and police is not even informed.[11] Honour Killings in India are not confined to the northern states only, Tamil Nadu has also the long history of such violence. Interactions with Tamil scholars, folklorists, educationists and activists of non-governmental organizations (NGOs) reveal that murders committed on the pretext of protecting family "honour" still occur, though sporadically, in the rural and semi-urban areas of Tamil Nadu. The obnoxious practice, it seems, existed in pre-modern Tamil society also and assumed its worst form under feudalism.[12]

1.4 Honour Killings Committed under the Dictates of Khap panchayats or by the Family of the Victims

There are various cases of honour killings which are committed either through the dictates of khap panchayats or done by the family members under the pressure of the community or these khap panchayats. The most horrible, apart from killing itself, is how it was carried out. The person can be burned alive, tortured, maimed or beaten to death. Such extreme actions are carried out just to follow the norms of society. Some of them are as:[13]

---

8 Jasdeep Kaur, "Unconstitutional Extra Judicial Bodies A Threat", *Army Institute of Law Journal*, Vol. 3, 2010, 81-91 at p. 81.

9 M. Rashid, "Honour Killing: A Threat to Progressive Society", *Competition Wizard*, August, 2010, 34-35 at p. 35.

10 Suranjita Ray, "Khap Panchayats: Reinforcing Caste Hierarchies", *Mainstream,* July 16-22, 2010, pp. 21-27.

11 *Supra* note 9.

12 *Frontline*, 28 August, 2009, 22-24 at p. 22.

13 *Supra* note 5. also refer to *http://www.thefreelibrary.com/Khap+panchayat+forces+Haryana+couple+to+live+as+siblings.a0317439428,http://article.wn.com/view/2013/02/10/Haryana_couple_to_defy_khap_ruling_annulling_marriage/,http://www.dnaindia.com/india/report-delhi-journalist-was-a-victim-of-honour-killing-1378748* (last accessed on 7 Feb 2014).

- In Feb., 2013 a village panchayat near Rohtak directed a married couple, satish and kavita,to stay as siblings as they are from the same gotra.
- Again 7 Feb. 2013 in village of Sonepat the khap panchayat ordered to terminate the marriage of the couple Anil and Seema, where the sarpanch claimed that the decision has been taken with the consent of the families and moreover justified its claim by saying that this is in consonance with the social customs which must be obeyed at all the costs.
- In Jan 2010 Khaps in Haryana decided that they will not recognize the marriages those which are against the family members as well as they will not recognise the inter-caste and inter-religion marriages.
- In July 2009 again khap expels the family of villager Ravinder Singh Gehlawat from Dhrana village in Jhajjar and fines them Rs. 1 lakh for marrying a girl who was not from the same gotra or village as Gehlawat but belonged to a gotra that forms the majority in Dhrana and so the villagers said the girl was like their daughter and not daughter-in-law.
- The most well-known case of honour killing is Manoj Babli in 2007. Babli's family approached the panchayat which ruled that the marriage in the same gotra and same village are against the Hindu Dharmashastras. Police protection could bring no relief to the couple. While they were on their way to a safer place, Babli's kith and kin brutally killed them and disposed of their corpses in a nearby canal
- In another case in July 2009, Ved Pal Mor, a resident of Mataur, is killed for marrying a girl from an adjoining village, Singhwala, in district Jind.
- The case that shook the conscience of civil society was the poisoning and burning of a newly married couple who belonged to two different castes at Puthukooraipatti village in Cuddalore district in July 2003. Both the victims were graduates. The young man was a Dalit while his wife was from the backward Vanniya community.[14]
- In 2004, In *Sushma Prabhu's case* ,Prabhu, Sushma's husband, was killed by her brother, Dilip Tiwari, and his associate in Mumbai Reason was a mismatched-caste marriage. It violated the marriage vidhan prescribed in the Dharmshastras. Sushma was a Brahmin and Prabhu belonged to a low caste.
- A young girl was hacked to death by her father and other family members over a love affair with a boy of the same caste in Khalidabad village in district Kaushambi, UP. (2010).
- In Koderma (Jharkhand) Delhi-based journalist Nirupama Pathak was strangulated to death by her mother as Nirupama wanted to marry her Kayastha boyfriend Priyabhanshu Ranjan. (May 4, 2010).

14 *Supra* note 12 at pp. 22-23.

- In a Haryana village near Sonipat two girls were killed by the family members for allegedly having affairs with their cousins. (June 28, 2010).
- In an inter-caste marriage case Reuben Joseph and the girl's father, Edward, killed the duo on the spur of the moment after they found them in a compromising position at the girl's residence in Friends' Colony, New Delhi. The paramour Hari Lal was from Punjab and Bimal, a Christian from Bihar. (July 13, 2010).
- In a suspected case of honour killing in village Ghari Madhiya in Ghaziabad, a Muslim girl and a Muslim boy were allegedly murdered by the girl's family members who were opposed to their alliance. (July 14, 2010).
- A 20-year-old Gujjar girl was allegedly cut into pieces by family members after she married her Dalit software engineer colleague.

In the recent report[15] it has been mentioned that people in India often criticize the existence, style of working and diktats by the Taliban in Afghanistan, but they are unaware of the fact that here too exist the Sarv Khap Panchayats which are more barbaric, brazen and venomous than their counterparts in Afghanistan. The Khap continue to be notorious for their 'controversial' orders throughout the country. They respect neither the Indian Constitution, nor Supreme Court or even the law of the land. They have often been compared to Taliban and although their rulings hold no constitutional validity, they are socially very powerful and have succeeded in sticking to their so-called traditions.

Some of the recent reports which reveal the brutality of the panchayats are given as under:

- On 16 Oct., 2012 a khap panchayat in Haryana, Jind District has blamed a consumption of Chowmin behind the growing incidents of sexual offences.[16]
- On 9 Jan., 2013, khap pnchayat in Hisar village banned mobile phones for youngsters and ordered girls not to wear jeans and T-Shirts. They have also put ban on night parties. Organizing a DJ party is out of bounds and a complete prohibition on liquor has also been issued. The decision was taken by the panchayat at Khedar village. As per report Sarpanch Shamsher Singh said, "We have decided to ban alcohol as it is the main reason behind rapes. We have also banned jeans and T-shirts for girl students as it is not a proper dress."Shanti Devi, a middle-aged woman present at the panchayat said, "The decision of the panchayat is good and will check the harassment of girls. Poor dressing is the main reason behind rapes". The panchayat formed an 11-member committee to ensure that the decision is implemented.[17]

---

15 "Khap panchayats = Taliban When will barbarism 'in the name of honour'end" available at *http://daily.bhaskar.com/article/CHD-khap-panchayats-the-very-own-taliban-of-india-without -any-rein-4501055-NOR.html.* (last accessed on 3 Feb 2014).

16 *http://theelefunt.com/2012/10/16/chinese-food-linked-with-increased-rapes-in-india-possible-ban-in-effect/* (last accessed on 7 Feb 2014).

17 *http://www.kractivist.org/india-khap-bans-jeans-and-t-shirts-for-girls-in-haryana-vaw-moral policing -wtfnews//* (last accessed on 9 Feb 2014).

- On 10 Jan., 2013 Khaps in Haryana on Jan 10, 2013 decided not to recognize love marriages unless the parents of both the bride and groom are present at the wedding. Besides love marriages, they will also not recognize inter-caste or same gotra marriages and marriages within the same village, as all this was not permitted under their customs. Representatives of various khaps across Haryana took a decision in this regard in a state-level meeting held in Jind district. Leaders from districts including Jind, Kurukshetra, Rohtak, Fatehabad, Hisar, Kaithal participated. This comes days before Khap representatives are to appear before the Supreme Court to present their views, following NGO Shakti Vahini moving court, seeking directions for Khaps to stop honour killings.[18]
- In Jan 2014, an extremely disturbing diktat by panchayat in West Bengal, a 20-year old tribal woman was gangraped by at least 12 men for allegedly falling in love with a man of different community.[19]
- On 8 Feb., 2014 a man from Rajasthan's Nagaur district was kidnapped and taken to a Haryana village where he was put through torture and humiliation, allegedly on the orders of a khap panchayat.[20]

1.5 Khap Panchayats Illegal Dictates And Human Rights Violation

These above examples of dictates itself reveal the atrocity and brutality committed by these bodies in the society under the garb of norms and tradition or customs of society. The dictates issued by these khap panchayats show that still in this democratic society individual are not enjoying their rights. It is in the contraventions of the spirit of Human Rights. Everyone is born with human rights regardless of the community to whom it belongs. Everyone has a right to be protected by the State. Human rights are inherent and integral to every human being and thus, are incorporated in the Constitutions of every State.[21] Human beings constitute the basic elements of all organized societies within the State and the international community. The opening line of Universal Declaration of Human Rights in 1948 declares that the respect for human rights and human dignity "is the foundation of freedom, justice and peace in the world".[22] In any organized society right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is free from restrictions which inhibit his growth. All human beings are designed to achieve this object.[23] The dictates of khap panchayats like killing in the name of honour, banning on the western clothes,

---

18 *http://archive.indianexpress.com/news/khaps-not-to-recognise-love-marriages-in-which-parents-are-absent/1057212///* (last accessed on 8 Feb 2014).

19 *http://daily.bhaskar.com/article/HAR-in-the-name-of-honour-khaps-manifest-poisonous-cocktail of-crime-ignorance-and-b-4501068-NOR.html///* (last accessed on 6 Feb 2014).

20 *http://www.hindustantimes.com/india-news/haryana-khap-orders-torture-caging-of-rajasthan-man/article1-1182020.aspxfeburary8,2014* (last accessed on 11 Feb 2014).

21 *Ibid.*

22 Shankar, Girija B. Nanda, *Human Rights Theory and Practice,* Academic Excellence, New Delhi, (2007), p. 1.

23 D.D Basu, *Indian Constitutional Law*, Modern Law Publication (2011), p. 268.

mobiles etc pose a serious threat to the human rights of the individuals in the society.[24] Honour killings are the direct violation of right to life, right to privacy right to dignity as well as right to marry of the individuals.[25] Specifically females are more targeted by the khap panchayats. In another incident, eve teasing led to the ban on girls to go to school in Haryana. Six villages of Mahendragarh district in Haryana banned girls from attending a higher secondary school in a nearby village after an eve-teasing incident. The matter relates to Bairawas village, where on May 6, 2013 a 17-year-old girl of neighboring Nihalawas village was teased by three boys. Navkiran Singh from Lawyers for Human Rights India (LHRI) in a petition in the High Court said: "The problem is the anti-women mindset of the villagers, who used this incident as an excuse to prevent the girls from being educated. With the growing assertion of girls in Haryana, the patriarchal systems and customs are being challenged and this is an attempt to prevent their emancipation."[26] Indian society is male dominated. Man occupies a superior status and the woman is merely his appendage. Discrimination against girls starts at the moment a child is born and continues to be maintained and reinforced through the process of differential socialization throughout her life.[27]

1.6 Judicial Perspective

The Judiciary in India has taken the stern action against the khap panchayats through the judicial decisions. Time and again the courts have issued the directions regarding these khap panchayats. The courts have observed that the State government cannot absolve itself of blame for the continued menace of these extra constitutional bodies. The positive decisions by the Court of law are no doubt a setback to the caste panchayats of Haryana which have a powerful influence in its socially and culturally backward villages. A positive step has been taken but there cannot be a constructive outcome until the society as a whole decides to fight back to demolish this age old obsolete system.[28]

---

24 The United States Declaration of Independence 1776 declares: "All men are endowed with certain inalienable rights and that among these are life, liberty and the pursuit of Happiness". Article 3 of the Universal Declaration of Human Rights, 1948 provides that: "Everyone has the right to life, liberty and security of person"., Article 4 of the American Convention on Human Rights, 1969 provides: "Every person has the right to have his life respected. This right shall be protected by law and in general from the moment of conception. No one shall be arbitrarily deprived of his life".

25 Marriage and family are the most basic and universal social institutions. Both institutions have deepest and the most complex involvements of human relationship. Marriage is one of the basic civil rights of man, fundamental to existence and survival. Article 16 of the Universal Declaration of Human Rights, 1948 provides that: Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to Marriage, during marriage and at its dissolution Marriage shall be entered into only with the free and full consent of the intending spouses.

26 Reported on 16 May, 2013 in *The Hindu*, also see *http://www.thehindu.com/news/national/ other-states/eveteasing-incident-leads-to-ban-on-girls-going-to-school/article4718792.ece* (last accessed on 11 Feb 2014).

27 Dr. Shashi Prabha Jain & Dr. Mamta Singh, *Violence Against Women,* Radha Publications, New Delhi (2001), p. vii.

28 "Reining in Khaps: Making DCs, SSPs, Accountable is Apt'', *The Tribune*, 12 March, 2010.

The Supreme Court has declared these 'khap panchayats' illegal which often decree or encourage honour killings or other institutionalized atrocities against boys and girls of different castes and religions who wish to get married or have married. "This is wholly illegal and has to be ruthlessly stamped out. There is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of the personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal," said a Bench of Justices Markandey Katju and Gyan Sudha Misra in the case of *Lata Singh v. State of UP*.[29]

In a historic judgment the Karnal sessions court in the case of honour killing of Manoj Babli in 2007 convicted the khap panchayat leader and six others. It sentenced five people to death and another to life imprisonment for murdering the young couple. Pronouncing the judgment the judge 'criticised the Khap Panchayats for functioning countrary to the Constitution and said they had become a law unto themselves'. Hailed as the first ever conviction in an honour killing case in Haryana, the judgment is being viewed as a stern message to khap panchayats.[30] Finding the murder of Manoj (23) and Babli (19) to be a fit case belonging to the "rarest of rare" category, the Court awarded capital punishment to the girl's brother Suresh, uncles Rajender and Baru Ram, and her cousins Gurdev and Satish.[31] Five of the accused, who are direct relatives of the girl, were charges under Sections 302, 264, 201, and 120B of the Indian Penal Code. The seventh accused, the driver of the vehicle used to kidnap the couple before they were done in, was charged with conspiracy and kidnapping.[32] This case then went to High court of Panjab and Haryana where the court on the March 2011 commuted the death sentence awarded to four convicts in the Manoj-Babli honour killing case to life imprisonment. Ganga Raj, said to be the prime conspirator, and another convict Satish were acquitted. On July 2, 2011, the Punjab and Haryana high court has also directed the Haryana government to award a compensation of Rs. 6 lakhs to Manoj's mother in the Manoj-Babli honour-killing case.

In the case of *Dilip Premnarayan Tiwari and Another v. State of Maharashtra* with *Sunil Ramshray Yadav v. State of Maharashtra*,[33] the Court observed that the caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste/community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case. In the case the Supreme Court said that "It is common experience that when the younger sister commits something unusual and in this case it was an inter-caste, inter-community marriage out of a

29 AIR 2006 SC 2522.
30 *Supra* note 3.
31 *Ibid.*
32 T.K. Rajalakshmi, "Checks on Khaps", *Frontline,* 98 (7 May, 2010).
33 (2010) 1 SCC (Cri.) 925 at p. 943.

secret love affair, then in society it is the elder brother who justifiably or otherwise is held responsible for not stopping such an affair". The Supreme Court views were a stark reality.

In the case *Arumugam Servai v. State of Tamil Nadu*,[34] the Supreme Court strongly deprecated the practice of khap/katta panchayats taking law into their own hands and indulging in offensive activities which endanger the personal lives of the persons marrying according to their choice.

While deciding the case of *Bhagwan Dass v. State (NCT) of Delhi*,[35] on 19 April, 2011 the Supreme Court directed all the State Governments to immediately suspend the District Magistrates/Collectors and SSPs/SPs, if they failed to apprehend those responsible for honour killings or prevent such incidents despite having advance knowledge.[36] The Supreme Court also said that the nation is passing through a crucial transitional period in our history and this court cannot remain silent in matters of great public concern, such as the present one. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly.[37] In this significant ruling, a two judge Bench of the Supreme Court comprising Justices Markandey Katju and Gyan Sudha Mishra held that honour killing came within the rarest of rare cases deserving the death penalty. The bench delivered the ruling while upholding the life sentence of a man for killing his daughter as she had dishonoured the family The Court opined that it is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. This order of the court was one of its kinds in that it took a strong position against honour killings, not only categorizing them as barbaric but also prescribing the severest punishment for such killings. While the death penalty as such might be a debatable issue, what was important was that the significance accorded by the Supreme Court to the problem of killing that was done in the name of honour.[38]

In his report to the Supreme Court ,Raju Ramachandaran, Senior Advocate was also appointed by the Court to assist it in PILs against Khap Panchayats has called for arrest of "self styled" decision makers and proactive action by the police to protect the fundamental rights of the people. He has recommended that in cases of khap panchayat, it is very necessary for the police to take timely steps so as to prevent any physical harm to the couple. Any gathering, which instigates commission of an illegal act, is an illegal gathering. Placed before a bench of Justice Aftab Alam and Justice Ranjana Prakash Desai, the report says the district magistrate and SP should be held accountable if a khap panchayat meets and directions, including "honour killings", are issued.[39] Ramachandran said the police must play a proactive role to

---

34 (2011) 6 SCC 405.

35 2011 AIR (SCW) 2867.

36 "Halt Honour Killings, Rules Supreme Court", *The Tribune,* 1 (20 April, 2011).

37 *Ibid.*

38 *Supra* note 35.

39 *http://www.hindustantimes.com/india-news/newdelhi/rein-in-khaps-prevent-honour-killings-sc-panel/article1-890134.aspx.*(last accessed on 30 Jan 2014).

protect the fundamental rights of people and should immediately identify district and villages that have had instances of honour killings in the past year. He further recommended departmental action against either the police officer-in-charge of the village or the SP in case it fails to prevent khap panchayat. The senior advocate said it was the local police's responsibility to inform panchayat members that such gatherings and diktats were illegal. Officer in-charge of police station should be issued directions by SP if there any inter- caste marriage takes place.[40]

On 4 Jan 2013, The Supreme Court invited 'Khap Panchayats' to hear their views before issuing any order to stop them from harassing and killing couples, particularly women in name of family's honour for entering into inter-caste or intra-gotra marriages. Additional Solicitor General Indira Jaising told the court that a mechanism is needed as they indulged in many acts which cannot be prevented under the law as some of them are not unlawful. She has also referred to the cases where the women are ostracized and their heads tonsured for going against their dictates and said even the Law Commission has described Khap Panchayats as unlawful assemblies .The NGO shakti vahini also complained to the court that though there was a spurt in such killings in Punjab, Uttar Pradesh, West Bengal and Haryana, neither the Centre nor the state governments were taking steps to curb the menace due to "vote-bank politics."[41] On Jan 14, 2013 The Sarva Khap Panchayat formed a 17-member panel to place their views effectively before the Supreme Court. The meeting was presided over by Hardeep Singh, chief of khap 84 and attended by scores of representatives of over 35 khaps across the state. At the meeting, the khap or caste council leaders said they are firm on their views and expressed that they are against the same 'gotra' and same village marriages "as these weddings infringe the century-old customs of the society,".Om Prakash Dhankhar, chief of Haryana Dhankhar Sabha, said, marriages are a way of preserving generations and want that the ritual to be protected. Secondly, 'Gotra' is a means of social identity for people of a village. Even medical science does not support marriages in the same Gotra.[42] Recently the khap panchayats have said that they will launch a national-level campaign to spread awareness that they support inter-caste love marriages, but oppose "same-gotra" marriages.

1.7 Legislative Approach

There is no specific law in India which deals with this gruesome act of honour killing and any punishments regarding the same. The most shameful situation emerges at that moment when the FIR's were not being registered in such cases, and even the cases that get pursued, their conviction rate is very low and if they are treated as murder they fall under the category of Section 300 of Indian Penal Code, 1860. Clause fourth of Section 300 IPC specifies that if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death

40 *Ibid.*

41 *http://www.thestatesman.net/index.php?option=com_content&view=article&id=437851& catid=35.* (last accessed on 2 Feb 2014).

42 *http://indiatoday.intoday.in/story/khap-panchayats-to-defend-their-values-before-supreme-court/1/242188.html.* (last accessed on 9 Feb 2014).

or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such bodily injury as aforesaid commits the offence of murder. In section 300 of IPC, the government is planning to introduce honour killings as the fifth clause[43] which at present defines 'murder' under the ***four*** categories. The murder for choosing to marry within or outside the 'gotra' (sub-caste) or caste or clan or community against the wishes of one's family or caste or clan or community will also come under the ambit of the honour killings. Killing somebody for engaging in sexual relations which are unacceptable to the community or caste panchayat or family will also fall under it. Externment of a person in the belief that he or she has brought dishonour will also be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. On the point that who all come under the ambit of honour killing, the draft suggests that all members of a body or group of caste or clan or community or caste panchayat, ordering or abetting the commission of murder will be deemed guilty of having committed the murder and that would make it liable for the maximum penalty i.e. death sentence. The proposed law would identify the crime and punish the offender, whether an individual or group. More importantly, the proposed law puts the burden of proof on the accused, thereby making them responsible to prove their innocence in the event of death taking place due to their actions. On the other hand, Khap panchayats have been demanding amendment in the *Hindu Marriage Act* to declare same gotra marriages illegal but the government has refused to abide by the demand of this Khap panchayat. So the only issue remains here is that how much time this proposed draft takes to become a law so as to extirpate the very menace of honour killings.[44]

In view of the increasing menace of these khap panchayats strong opinion has been voiced by various segments of community. An important contribution to this movement has been made by the Law Commission of India in its report two hundred forty second titled "Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework." The law commission has observed that the rising incidence of commission of murders of persons marrying outside their caste or religion and other serious offences perpetrated or hostility generated against them and also causing harm to their close relatives or a section of the community on considerations of caste and 'gotra' are matters of grave concern. The pernicious practice of Khap Panchayats and taking law into their own hands and pronouncing on the invalidity and impropriety of Sagotra and inter-caste marriages and handing over punishment to the couple and pressurizing the family members to execute their verdict by any means amounts to

---

[43] The proposed *fifth* clause says, "If it is done by any person or persons acting in concert with, or at the behest of, a member of the family or a member of a body or group of the caste or clan or community or caste panchayat (by whatever name called) in the belief that the victim has brought dishonour or perceived to have brought dishonour upon the family or caste or clan or community or caste panchayats". In the explanation given for the clause, the proposal says that "dishonour" and "perceived to have brought dishonour" will include "acts of any person adopting a dress code which is unacceptable to his or her family or caste or clan or community or caste panchayat".

[44] Priyamvada Shukla, "A Critical Jurisprudential Appraisal of Law and Justice in Crime of Honour Killing in India", available at *www.rgcresearchjournal.org*, (Accessed on Jan 21, 2014).

flagrant violation of rule of law and invasion of personal liberty of the persons affected. The commission further observed that Panchayatdars or caste elders have no right to interfere with the life and liberty of such young couples whose marriages are permitted by law and they cannot create a situation whereby such couples are placed in a hostile environment in the village/locality concerned and exposed to the risk of safety[45] But the Commission is of the view that there is no need for introducing a provision in Section 300 IPC in order to bring the so-called 'honour killings' within the ambit of this provision. The existing provisions in IPC are adequate enough to take care of the situations leading to overt acts of killing or causing bodily harm to the targeted person who allegedly undermined the honour of the caste or community.[46] The bill has been proposed by the commission and the main focus of the proposed sections of the Bill is the congregation/assembly by the village elders which propagates the views against the marriages and act as an instrument in the hands of the so called panchayats to manipulate the people.

The salient features of The Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) bill, 2011 are:[47]

1. The law commission has proposed the draft in which the idea underlying is that there must be a threshold bar against congregation or assembly for the purpose of objecting to and condemning the conduct of young persons of marriageable age marrying according to their choice, the ground of objection being that they belong to the same gotra or to different castes or communities.
2. Section 4 of the Bill deals with criminal intimidation by the members of unlawful assembly or others to secure compliance with the illegal decision of the assembly. Such acts of criminal intimidation which are punishable under the general law, i.e., the Indian Penal Code have been specifically introduced for the purpose of meting out higher punishment to the members of unlawful assembly.
3. According to Section 5 the provisions of Sections 2, 3, and 4 of the proposed Bill are without prejudice to the provisions of IPC.
4. In order to have sufficient deterrent effect, mandatory minimum punishments have been prescribed while taking care to see that such punishment has an element of proportionality.
5. Apart from these penal provisions, a specific section has been proposed to empower the District Magistrate or the SDM to take preventive measures and a further obligation is cast on them to take note of the information laid before them by the marrying couple or their family members and to extend necessary protection to them. The officials are made accountable for the failure or

45 The Law Commission of India two hundred forty second report "Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework." (August 2012), available on *http://lawcommissionofindia. nic.in/ reports/report242.Pdf.*

46 *Ibid.*

47 *Ibid.*

omission on their part to take necessary steps to prevent unlawful assembly (caste *panchayats*, etc.) or to give protection to the targeted couple. It has been provided that the offences shall be tried by a Court of Sessions in the District presided over by the Sessions Judge or Additional Sessions Judge as notified by the High Court. (Section 8)

6. According to section 12 of the Bill, the offences under the proposed Bill are cognizable, non-bailable and non-compoundable.
7. Section 6 of the proposed Bill provides that a presumption to the effect that the participants in unlawful assembly intended to commit and abet the offences punishable under Section 3 and 4 of the Bill in order to carry out the illegal decision taken by them. Such presumption will supply an important link in the chain of evidence. In respect of the overt acts under Sections 3 and 4, this presumption would be attracted.

So it is necessary to prevent assemblies which take place to condemn such alliances. This Bill is therefore, proposed to nip the evil in the bud and to prevent spreading of hatred or incitement to violence through such gatherings. The Bill is designed to constitute special offences against such assemblies, in addition to other offences under the Indian Penal Code.[48]

On 23 December, 2012 a three member Committee headed by Justice J.S. Verma, former Chief Justice of the Supreme Court, was constituted to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The Committee submitted its report on January 23, 2013. The Justice Verma committee has made wide ranging recommendations for changes to various laws that impact upon women's right to equality and right to dignity.[49] The committee said actions of khap panchayats are extremely relevant for its consideration in the context of crime against women. It was of the view that the means adopted by khap panchayats to secure compliance of members of their community with their notions of morality and right conduct, in the name of culture and tradition, has "assumed unreasonable proportions"."We expect the state to ensure that these institutions will not interfere with the choices made by men and women in respect of marriage...," the committee said.[50]

There has been a spurt in illegal intimidation by self-appointed bodies for bringing pressure against Sagotra marriages and inter-caste, inter-community and inter-religious marriages between two consenting adults in the name of vindicating the honour of family, caste or community. Such bodies have also resorted to incitement of violence and such newly married or couples desirous of getting married have been subjected to intimidation and violence which has also resulted into their being hounded out of their

---

48 Statement of Objects and Reasons given in the annexure attached to the Bill 2011, as given in the Law Commission 242nd Report.

49 Justice Verma Committee Report 2013 at p. 231, available at *http://www.scribd.com/doc /121781170/Justice-Verma-Report* (last accessed on 2 Feb 2014).

50 *http://www.rediff.com/news/report/clip-khap-panchayats-wings-j-s-verma-panel-to-govt/20130123.htz* (last accessed on 7 Feb 2014).

homes and sometimes even murdered.[51] On Feb. 1,2014 the Aam Aadmi Party (AAP) defended the existence of the khap panchayats, but said it was opposed to any kind of decision given by them that violated the law of the land.[52]

1.8 Conclusion

The *Special Marriage Act*, 1872 and 1954 legalize marriage between members of different castes and religions. *Hindu Marriage Act*, 1955, provides more freedom in marriage by doing away with recognition of marital partners according to caste and permits both sagotra and inter-caste marriages .Organized through clans and gotras, khap panchayats uphold social norms in the community. While they might have provided a kind of rough justice once, they are terrible force for the villagers and town persons who have no option but to endure the pronouncements, despite the fact that they have no legal justifications. One major hurdle has been the way public officials are reluctant to take on the system, accepting it as a custom a way of life in the region. In fact the worst thing is that they have got the political support, because caste solidarity feeds into their vote banks.[53] India is a democratic country where individuals have been guaranteed various fundamental human rights. Inter-caste marriages have been validated in India as early as in 1949 by the Hindu Marriages Validity Act, 1949. These rights should not be hindered or curtailed by these bodies simply by issuing illegal dictates. So it becomes the duty of the government to step in and ensure that some effective steps will be taken to deal with such bodies if they try to violate the basic human rights of the people.

---

51 *Supra* note 48.

52 *http://www.firstpost.com/politics/aap-defends-existence-of-khap-panchayats-1370251.html.* (last accessed on 11 Feb 2014).

53 *Supra* note 3.

PROBLEMS OF INTERNATIONAL CRIMINAL JUSTICE: LEGAL FRAMEWORK FOR SUPPRESSING INTERNATIONAL CRIMES UNDER INTERNATIONAL LAW

Dr. Sukhwinder Kaur Virk*

1.1 Introduction

The purpose of criminal law is to define the conduct of accused persons socially and to punish them for their delinquent behavior with accepted norms of law. Hence the primary objective of criminal law is the preservation and maintenance of public order for peace, security and development. Its functions also include the protection of the structure and fabric of community and its members from the forces of evils and destructions. Where the civil law fails to achieve the desired result or the specific social purpose the law of crimes comes to the help of aggrieved persons. "The broad purpose of International Criminal Law could in no way be different from that of municipal criminal law. It too ought to preserve the world public order and attempt to punish conduct, which is intolerable to the community of nations."[1] In the international legal system there are no such legislative, executive and judicial authorities as the states have and the rules of International law are created or made with the consent of states. The rules are adopted and regulated also with the consent of states. So far the performance or implementation of rules and regulations framed by states under the heading of International Law is also dependent upon the will of the states. The problem before the thinkers and jurists of international law had been to identity the matters of international concern. Crime was one of these. In traditional international law, the individual was regarded as an object instead of subject and he enjoyed no rights and was burdened by no duties. It was a common belief of 18th and 19th century. It is beyond doubt there occurred a change in the status of individual after the establishment of the United Nations Organizations and adoption of various human rights conventions under the United Nations.[2] Now individual can approach

---

* Assistant Professor of Law, Rajiv Gandhi National University of Law, Punjab.

1 Ramesh, "The Legal Nature of International Criminal Court – An Analysis", *Indian Bar Review*, Vol. XXX, No. I, 2003, p. 59.

2 *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); as amended by Protocols (first in 1952, fourth in 1963, sixth in 1983 and seventh in 1984) 11 and 14, 4 November 1950, ETS 5; *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered in to force 22 April 1954) General Assembly Resolution 429(V) 14 December 1950; *International Covenants on Civil and Political Rights*(adopted 16 December 1966 and entered in to force 23 March 1976) 999 UNTS 171; *Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966 and entered in to force 3 January 1976) 993 UNTS 3; and two *Optional Protocols* to the *Covenant on Civil and Political Rights* which *Protocols* (entered into force 23 March 1976 and 11 July 1991 respectively); *Convention on the Elimination all Forms of Racial Discrimination* (adopted 21 December 1965 and entered in to force 4 January 1969) General Assembly Resolution 2106 (XX). 21 December1966; *Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entered in to force 3 September 1981) General Assembly Resolution 34/180, 18 December 1979; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* (adopted 10 December 1984 and entered in to force 26 June 1987) General Assembly Resolution 39/46, 10 December 1987.

international tribunals even against his own state if his/her rights are violated. Hence, individual has a legal status under international law.

1.2 Concept of International Crimes

Crime is an offence which is against individuals, society and community. Crime is always prohibited by law. Crime disturbs law and order and it preaches war. According to Salmond, a crime then is an act deemed by law to be harmful to society general even though its immediate victim is an individual.[3] The definition of an international crime has been given by many scholars of law. Prof. Schwargenbergar says, "Acts which strike at the very roots of international society are called international crimes."[4] Prof. Quincy Wright defines "A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest and which may not be adequately punished by exercise of the normal jurisdiction of any state."[5] Thus a crime is an act or omission forbidden by law for which the state prescribes a punishment in its own name. International crimes consist of those acts which violate international rules and regulations and are intolerable to the community of nations. War Crime, Crimes against Humanity, Crimes against Peace, Aggression, Crime of Apartheid, Genocide, Unlawful use of Weapons, Terrorism, Transnational Organized Crime, International Drug Trafficking, Unlawful Human Experimentation, Cyber Crimes and Piracy are considered as international crimes by the jurists and international community.

1.3 Problems of International Criminal Justice:

Benjamin Ferencz, who was prosecutor in Nuremberg Trial had said, "There can be no peace without justice, no justice without law and no meaningful law without a court to decide what is just and lawful under any given circumstances".[6] Though the justice can not be provided until a viable justice delivery machinery is not in existence. To make the justice fair and relevant, it is necessary to accurate and transparent judicial system for international community. Various challenges are before international criminal system to deliver fair justice; Such as:

> The main problem of international criminal law revolves around the names of crimes that can be considered as international crimes. It is a very difficult task to differentiate the national crimes from the international crimes. Before the Nuremberg Trial the definitions of crime against peace and security and crime against humanity were not clear. On the outcome of Nuremberg Tribunal John F. Murphy[7] rightly said, "The Tribunal's judgement may be as a truly landmark step

---

3 P.J. Fitzerald, *Salmond on Jurisprudence,* 12th Edn., (1966), p. 92.

4 G. Schwarzenbergar, *The Problem of International Criminal Law,* 3rd Edn., (1950), p. 263.

5 Quincy Wright, "The Law of Nuremberg Trial", *American Journal of International Law,* Vol. 46 (1947), pp. 55-56.

6 Quoted in Y.S.R. Murthi, "A Giant Step Forward or Delusion – An Evaluation of the Rome Statute of the International Criminal Court", *Indian Journal of International Law,* Vol. 40, July-September, 2000, p. 505.

7 John F. Murphy, "Norms of Criminal Procedure International At the Military Court" in G. Ginsburgs and V.N. Kudriatsev (ed.), *The Nuremberg Trials and International Law,* Klumer Academic Publishers (1990), p. 72.

> in the progressive development of international law. Since1946, the United Nations made efforts to codify international crimes. The General Assembly began its efforts to codify international crimes in its first session when the United States sponsored Resolution 95(1), adopted on 11 December 1946 which affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal.[8]

The protection of individuals from the violations of their rights and to promote law and justice requires appropriate mechanism to enforce the law. For decades international law lacked sufficient mechanism to hold individuals accountable for the most serious international crimes. The problem was that, when the most serious crimes were committed the national courts were least interested to tackling the crimes. The main reason was the involvement of agents of the concerned state in the commission of crimes. If we look at serious crimes committed in – Nazi Germany, Rwanda, the former Yugoslavia, Cambodia, Libya and Syria – the Governments themselves or their agents were involved in the commission of those crimes. Although prosecutions were carried out by ad-hoc Tribunals in some cases but results are not satisfactory. Such Tribunals had serious deficiencies, weaknesses and limitations. They were not only concerned with specific conflict but were also created only by few parties. Moreover some times, the Tribunals had to become partial because they were created by the victorious parties of the conflict and covered crimes committed by the defeated parties only.

The next problem of is the international terrorism. International terrorism still has no definition under international law. Many efforts have been made by the League of Nations[9] and the United Nations[10] and its specialized agencies for evolving a consensus between the member states on the definition of 'International Terrorism'. But no agreeable solution yet has come out as the result of such efforts.[11] Due to this situation the international law has become teeth-less against the individuals and the states who propagate, use and finance terrorism and recruit terrorists for their ill designs. The powerful nations' role is also suspicious to find the agreeable definition of term 'international terrorism'. On the one hand these nations swear to fight against international terrorism. On the other hand, they support the counter-revolutionary and fundamental forces to wage wars against their (powerful nations) enemies as we saw in Afghanistan, when US supported Talibans against the Pro-Soviet Regime. They also committed acts of terror against the Iraqi and Libyan Arab Jamahiriya governments. Several crimes under 'International Crimes' head have been defined but we cannot bring the international terrorism, international drug trafficking and international hijacking under the purview of International Criminal Court.

---

8 UN General Assembly Resolution 95(1), 11 December 1946. UN Doc. A/64/Add.1(1946).

9 *Convention for the Prevention and Punishment of Terrorism,* 1937, Article 1(2), See also Proceedings of the International Conference on the Repression of Terrorism, League of Nations Doc. C. 94, Vol. 3, 1938, p. 49.

10 UNs Doc. A/AC/6/418, UNs General Assembly Resolution 3034(XXVII), 18 December 1972; See also UN General Assembly Resolution, 49/59, 9 December 1994.

11 J.Murphy, "Defining International Terrorism : A Way Out of", *Israel Year Book of Human Rights,* Vol. 19, 1989, pp.14-18.

The implementation of the rules of international bodies is another problem of international criminal law. The system of providing international criminal justice is basically dependent on the sweet will and efforts of states. The provisions of international treaties and conventions contain the rules regarding the support of states to book the criminals but national judicial system often hopelessly compromised to take action.

1.4 Legal Framework for Suppressing International Crimes

Before and after the establishment of the United Nations many sincere efforts were made to prepare the code of offences against the violators of the law. Philosophers, jurists, sociologists, economists and statesmen were worried about international disturbance. They made individually as well as collectively efforts to establish an international body for punishing the offenders of law of peace, goodwill and justice. War criminals have been prosecuted since the ancient period. The early laws and customs of war can be found in the writings of classical authors and historians. Those who breached them were subject to trial and punishment.[12] In the second half of the eighteenth century several trials took place in Great Britain and United States in which individuals were accused of committing international offence. However, such of these trials were not international in character and they affected the British and American nationals. More than two hundred years ago, Immanuel Kant called for peace and protection of human rights under international law in his work "Perpetual Peace".[13]

Historically, first International Military Tribunal was to have taken place in 1474 with the trial of Peter Von Hagenbush in Breisach, Germany by a Court of the Holy Roman Empire that consisted of 28 judges. The charges were for crimes against the law of God and Humanity brought against Von Hagenbush for his conduct as commander of the troops in the execution of military occupation and for the ill-treatment he brought about the city's civilian population.[14] The victorious powers of 1815 did not institute a judicial proceeding to try Napoleon for violating the Convention of Moss 11 April 1814. According to this Convention Napoleon was to retire from war activity. But he re-entered France with an army. The Congress of Vienna thereupon by a Declaration of March 13, 1815 declared Napoleon "an out law."[15] With the development of law of armed conflict in the mid-nineteenth century, concepts of international prosecution for humanitarian abuses slowly began to emerge. One of the founders of the Red Cross movement, which grew up in Geneva in the 1860s, urged a draft statute for an international criminal court. Its task would be to prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms. But in 1872 a Swiss Gustane Moynier, influenced by the atrocities committed in the 1870-71 war, submitted the first proposal for the establishment of an

12 Schabas W.A., *An Introduction to the International Criminal Court,* Cambridge University Press (2001), p. 1.

13 Asha Sundaram, "International Criminal Court", 25, *The Academy Law Review,*2000 p. 186.

14 George Schwarzenbergar, *International Law as Applied by International Courts and Tribunal,* Vol.2, London: Stevens and Sons (1968), p. 462.

15 Robert K. Woetzal, *The Nuremberg Trial in International Law,* London, Stevens and Sons (1962), p. 22.

International Criminal Court.[16] Pope Paul VI once said, "If you want peace, work for justice." This is reflected in the International Criminal Court's Preamble.[17]

1.4.1 The Hague Conventions of 1899 and 1907

The Hague Conventions of 1899 and 1907 were the first codification of the laws of war in an international treaty. These Conventions provide an important series of provisions dealing with the protection of civilian populations. The Hague Conventions (1899 and 1907), as international treaties, imposed obligations and duties upon states and did not create criminal liability for individuals. These Conventions declared certain acts to be illegal but not criminal. Yet within only a few years, the Hague Conventions 1899 and 1907 were being presented as a source of the law of war crimes.

In 1913, a Commission of Inquiry sent by the Carnegie Foundation to investigate atrocities committed during the Balkan Wars used the provisions of the Hague Convention IV as a basis for its description of war crimes.[18] Immediately following the First World War, the Commission on Responsibilities of the Authors of War and on Enforcement of Penalties, established to examine allegations of war crimes committed by the central powers, did the same.[19] But actual prosecution for violation of the Hague Conventions had to wait until Nuremberg. Offences against the laws and customs of war, known as the 'Hague Law' because of their roots in the 1899 and 1907 Conventions, are codified in the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia[20] and in Article 8(2)(b)(v) and (vi) of the Statute of the International Criminal Court.

1.4.2 Efforts of the League of Nations

After the First World War, the "Allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" met on January 25, 1919, to recommend the necessary action to be taken against enemy nationals accused of having committed war crimes. The Commission recommended the setting up of a High Tribunal consisting of three members from each of five major allied powers and one from each of the other powers. The recommendations of the Commission had a great influence on provisions of the Treaty of Versailles on the punishment of war criminals.[21] Article 227 of the Treaty of Versailles,[22] provided for the prosecution of

16 Christopher Keith Hall, "The First Proposal for a Permanent International Criminal Court", *International Review of the Red Cross,* March (1998), pp. 57-74.

17 M. Cherif Bossiouni, "Negotiating The Treaty of Rome on the Establishment of an International Criminal Court" *Cornell International Law Journal,* Vol. 32, (1999), pp. 468-469.

18 Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars on Washington : Carnegie Endowment for International Peace (1914).

19 Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on "Responsibilities on Violations of the Laws and Customs of War", Conference of Paris, Oxford: Clarendon Press 1919.

20 Statute of the International Criminal Tribunal for the Former Yugoslavia, UNs Doc., S/RES/827 (1993).

21 B.N. Mehrish, *War Crimes and Genocide : The Trial of Pakistani War Criminals,* Oriental Publishers, Delhi (1972), pp. 37-38.

22 League of Nations Official Journal Vol. 3, 1920, 11 Martens Nouveau Recueil (3rd) 323.

Kaiser Wilhelm II before special International Tribunal for the supreme offence against international morality and the sanctity of treaties. However, the above provisions of the Treaty of Versailles were never realized in the sense they were intended.[23] Germany made every effort to prevent the handing over the persons charged with war crimes. On 13 February 1920, the Allied Powers consented to let Germany try the persons accused of war crimes. The German court met at Leipzig out of the forty five cases which submitted by the Allies, twelve were tried by the Leipzig Court and six dependents were convicted. The Allied Powers were highly dissatisfied and as a protest withdrew the outcome of the Leipzig Court.[24] After the Leipzig Trial various attempts were made to set up an international court to administer international law in trials for offences against the laws and customs of nations. These attempts emanated from private associations and individuals.[25] Although these initial efforts to create an international criminal court were unsuccessful, these stimulated many international lawyers to devote their attention to the matter during the years that followed. In 1937, along with the Convention for the Prevention and Punishment of Terrorism, the League of Nations drafted a convention for the establishment of an international criminal court. Although, this convention was signed by thirteen States[26] but unfortunately, this attempt proved to be a failure due to insufficient ratification by member states. Another reason for the failure of this convention was the outbreak of Second World War.

1.4.3 Nuremberg Tribunal

In the Moscow Declaration of 1 November 1943,[27] the Allies[28] affirmed their determination to prosecute the Nazis for War Crimes. On 26 June1945 representatives of the allies met in London to decide on a common cause of action with respect to the trial of the major European war criminals. In 1945 the Nuremberg Tribunal was established to try and punish the persons who were guilty of War Crimes, Crimes against Peace and Crimes against Humanity in Germany during Second World War. Under the leadership of Hitler these accused had committed inhuman atrocities upon the Jews. These accused were also charged for having violated the Treaty of Versailles, 1919 and Killogg-Briand Pact (Pact of Paris 1928).[29]

---

23 Robert K. Woetzel, *The Nuremberg Trial in International Law,* London, Stevens and Sons (1962), pp. 31-32.

24 *Ibid,* p. 34.

25 *Ibid,* p. 36.

26 Belgium, Bulgaria, United Kingdom, Chile, France, India, Hungary, Italy, Poland, Romania, Spain, Switzerland and the then USSR, see League of Nations, Doc. 94, M.47 (1938).

27 United Nations Information Organisation, London : United Nations (1945), p. 35.

28 The United States of America, the United Kingdom and the then Soviet Union.

29 The Killogg-Briand Pact also known as *Pact of Paris,* was the creation of Foreign Minister Aristide Briand and U.S. Secretary of State Frank B.Killogg in 1928. This Agreement was signed in Paris on August 27, 1928 by France, the United States and thirteen other powers – Australia, Belgium, Canada, Czechoslovakia, Germany, Great Britain, India, The Irish Free State, Italy, Japan, New Zealand, Poland and South Africa. The Contracting Parties agreed that settlement of all conflicts be resolved by peaceful means and parties pledged themselves to renounce the resort to war as an instrument of national policy in their mutual relations. See also Ferrell, Robert H, *Peace in Their Time : The Origin of the Killogg – Briand Pact,* New Heawn Conn., Yale University Press (1952), p. 36.

1.4.4 Tokyo Tribunal

As Nuremberg Tribunal was established to try war criminals of Germany, the Tokyo Tribunal was established to try the war criminals of Japan. On 3 April 1946, the Far Eastern Commission sitting at Washington adopted a general policy decision on the "Apprehension, Trial and Punishment of War Criminals in the Far East." Prior to adoption of the policy decision of 3 April 1946 the supreme commander for the allied powers in Japan had issued a proclamation on 19 January 1946, establishing an International Military Tribunal for the Far East. Article 5 of the Charter of Tokyo Tribunal provides jurisdiction over persons and offences. "The Tribunal shall have the power to try and punish Far Eastern War criminals who as individuals or as members of organizations are charged with offences which include crimes against peace, conventional war crimes and crimes against humanity.

1.4.5 Efforts of the United Nations to Combat International Crimes

One of the primary objectives of the United Nations is to achieve universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection, a number of treaties and conventions are entered into force time to time to fight against impunity and struggle for international peace and justice.

1.4.5.1 Genocide Convention 1948

The genocide committed during the Second World War shocked the whole mankind. The wholesale killing was done by Germany under the National-Socialist regime during the Second World War and as a result of which it became necessary to enact rules so that such acts may not be repeated.[30] Genocide was given priority by the United Nations for codification. The General Assembly of the United Nations in 1946 adopted a Resolution, wherein, it unanimously declared that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world."[31] The General Assembly ultimately adopted a Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[32] This Convention is also called as Genocide Convention, 1948.

1.4.5.2 Geneva Conventions 1949

The four Geneva Conventions of 12 August 1949 and their three Additional Protocols[33] codified many of the laws of war and established the individual

---

30 H.O. Agarwal, *International Law*, 4th edn. 610, Allahabad Law Agency Faridabad (1997).

31 UNs General Assembly Resolution 96 (1), 11 December 1946.

32 UNs General Assembly Resolution 260 (III), 9 December 1948.

33 *Geneva Conventions, 1949*

(i) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* 12 August 1949, 75 UNTS 31;

(ii) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces* at Seas, 12 August 1949, 75 UNTS 85;

(iii) *Geneva Convention Relative to the Prisoners of War,* 12 August 1949, 75 UNTS 135;

(iv) *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 75 UNTS 287.

[Footnote No. 33 Contd.]

responsibility for grave breaches of those laws. These conventions deal with the treatment during war of wounded, sick and shipwrecked military personals, prisoners of war and civilian.

1.4.53 Draft Code of Offences against Peace and Security of Mankind

The work on the international criminal court was initiated in 1948 in the UNs General Assembly and in 1949 in the International Law Commission.[34] In 1949, the International Law Commission started working on the "Formulation of the Nuremberg Principles and Preparation of a Draft Code of Offences against the Peace and Security of Mankind."[35] In 1950, a Draft Code against Peace and Security of Mankind was prepared by a Sub-Committee which was appointed by the International Law Commission.[36] Although the International Law Commission concluded that establishment of an international criminal court was desirable but there was no progress to be made due to many reasons. Ultimately, the General Assembly established a new Committee entitled '1953 Committee on International Criminal Jurisdiction' to prepare a Draft Statute for the International Criminal Court. The 1953 Committee also reviewed the draft Statute drawn up by the 1951 Committee on International Criminal Jurisdiction. The Committee suggested four methods of establishing the International Criminal Court – a) by amendment of the charter of the United Nations; b) by multilateral Convention; c) by General Assembly Resolution; d) by Resolution of the General Assembly followed by Conventions.[37] Both the 1953 Revised Draft Statute and the 1951 'Draft Code' were tabled until such time as Aggression was defined.[38] In 1974 the definition of Aggression was finally adopted by the General Assembly.[39] Although a large amount of work for the

---

[Footnote No. 33 Contd.]

Protocols Additional to the Geneva Conventions, 1949.

(i) Protocol I *Additional to the Geneva Conventions of 12 August 1949* and Relating *to the Protection of Victims of International Armed Conflicts* adopted on 8 June 1977.

(ii) Protocol II *Additional to the Geneva Conventions of 12 August 1949* and *Relating to the Protection of Victims of Non-International Armed Conflicts,* 8 June 1977.

(iii) Protocol III *Additional to the Geneva Convention of 12 August 1949* and *Relating to the Adoption of an Additional Distinctive Emblem* adopted on 8 December 2005.

See generally, Hans-Peter Gasser, *International Humanitarian Law – An Introduction,* Haupt (1993).

See also Dr. S.R.S. Bedi, "The Relationship between International Humanitarian Law and International Human Rights" *Punjabi University Law Journal (Pbi.ULJ),* Vol. I, InauguralIssue, 2007, pp. 1-21. Dr. Sukhdarshan Singh Khehra and Dr. (Mrs.) Harpal Kaur Kehhra, "Protected Status under International Humanitarian Law : Conceptual Analysis of Prisoners of War", *Pbi. ULJ,* Vol. II, 2008, pp. 25-39.

34 'The Rome Statute of the International Criminal Court: Overview', available at <*www.un.org/law/general/overview,htm*> (visited on 10 January 2014).

35 Year Book of International Law Commission (1949), referring to UN General Assembly Resolution 177 (II), 21 November 1947.

36 UNs Doc. A/C N. 4/25, 26 April 1950.

37 Yuen-Le-Uang : "The Establishment of an International Criminal Jurisdiction", *American Journal of International Law,* Vol. 47, 1953, pp. 638-57.

38 UN General Assembly Resolution 898 (IX), 14 December 1954.

39 UN General Assembly Resolution 3314 (XXIX), 14 December 1974.

Statute of the International Criminal Court had been done by the said Committees but the Statute neither recommended and nor accepted.

1.4.5.4 Tokyo Convention 1963

"Aircraft Hijacking is a contemporary addition to the roster of international and national crimes and the necessity for its control at international and national level is only beginning to be recognised by states."[40] Aircraft Hijacking is an unlawful act. It is a form of international terrorism. It is an attack on international order and injures the international community. The Convention on Offences and Certain Other Acts Committed On Board Aircraft (Tokyo Convention) was signed at Tokyo in a Diplomatic Conference on September 14, 1963.[41]

1.4.5.5 The Hague and Montreal Conventions 1970, 1971

These Conventions were significant milestone for suppressing the crime of Hijacking.[42] The Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), 1970 came into force on October 14, 1971.[43] This Convention developed the concept of Hijacking. As compared to the Tokyo Convention, it further widened the net to apprehend the hijackers and to guarantee the safety of flights of civil aircrafts. The Montreal Convention is directed against those acts which endanger the safety of the aircraft in flight whereas the Hague Convention protects only an aircraft in flight. Both Conventions (The Hague Convention, 1970 and Montreal Convention, 1971) provided that the states parties may have jurisdiction over hijackers in some or other way and it will became difficult for hijackers to escape the process of law.

1.4.5.6 Conferences on International Criminal Law

The two Conferences on International Criminal Law were held in Racine, Wisconis, U.S.A. in 1971-72 and in Ballagio, Italy in 1972 under the auspices of the international foundation for the establishment of an International Criminal Court. The third Conference on International Criminal Law and fourth Conference for the establishment of an International Criminal Court under the auspices of the Foundation were held at Dacca, Bangladesh and at San Juan, Pureto Rico in December, 1974 and January, 1976 respectively. Besides this, representatives of 30 countries attended an international Conference of experts on International Criminal Law and jurisdiction and major violations of international law in 26-31 May 1977 in Boston (U.S.A.). Last but not the least, a draft International Criminal Code prepared

---

40 Alone E. Evans, "Aircraft Hijacking : Its Causes and Cures", *American Journal of International Law,* Vol. 63, 1969, p, 695.

41 This Convention was signed by the representatives of sixteen States under the auspices of the International Civil Aviation Organisation on 14 September 1963 and came into force on 4 December 1969.

42 Sami Shubber, "Aircraft Hijacking under the Hague Convention, A New Regime", *International Comparative Law Quarterly,* Vol. 22, 1973, p. 725.

43 The Text of the Hague Convention, 1970 is available at <www.mcgill.ca/ hague1970> (visited on 20 January 2014).

by eminent lawyer, Cherif Bassiouni, Secretary-General of the International Association of Penal Law was discussed at the International Institute of Higher Studies in Criminal Sciences.[44] Despite all these efforts "the establishment of an International Criminal Court and a system of international criminal jurisdiction is still an object of scientific investigation and discussion".[45]

1.4.5.7 International Convention on the Suppression and Punishment of the Crime of Apartheid, November, 1973

Article 1 of the *Apartheid* Convention[46] declares *apartheid* as a crime against humanity, violating principles of International Law and constituting a serious threat to International peace and security. The Convention enumerates that the liability for the commission of the crime of *apartheid* extends not only to those 'individuals, numbers of organizations and representatives of the State', who commit the offence but also to all those who directly abet, encourage or co-operate in its commission regardless where such individuals may be at the time of offence.[47] Further it is provided in other provision of the Convention[48] that persons charged with *apartheid* may be tried by a competent Tribunal by any state party to the convention which may acquire jurisdiction over the person of the accused or by an International Penal Tribunal having jurisdiction with respect to those states parties which shall have accepted its jurisdiction.

It becomes clear from the above Conventions that various attempts have been made to evolve a body of International Criminal Law. Though provisions for the establishment of International Penal Tribunal have also been made in various conventions yet there was no code of international criminal law which addressed directly to the subjects and objects of international law. "The establishment of an International Criminal Court and a system of international criminal jurisdiction is still an object of scientific investigation and discussion",[49] said I. Blischenko ... in favour of the need of International Criminal Court. Terrorism, money laundering illicit drug trafficking and violent street crimes are creating insecurity throughout the world. There is utmost need to make sincere efforts in this direction.

1.4.5.8 Draft Statute for International Criminal Court by International Law Commission

The International Law Commission adopted, a 60 Article Draft Statute for an International Criminal Court at its Forty Sixth Session held at Geneva from 2 May to

---

44 Dr. S.K.Kapoor, *International Law and Human Rights*, Central Law Agency, Allahabad 2002, p. 367.

45 I. Bilshcherrko and N. Zhdanov, *Terrorism and International Law*, Progress Publishers, Moscow 1984, pp. 254-55.

46 For the Text, see P.R. Ghandhi (ed.), *Blackstone's International Law Documents*, Ist Edn.,1995, p. 78.

47 The *International Convention on the Suppression and Punishment of the Crime of Apartheid* 1973, Article 3.

48 *Ibid*, Article 5.

49 I. Blischenko and N. Zhdanov, *Terrorism and International Law*, Progress Publishers, Moscow 1984, p. 276.

22 July 1994.[50] The International Law Commission's Draft Statute of 1994 focused on Procedural and Organizational matters, leaving the question of defining the crimes and the associated legal principles to the Code of crimes, which it had yet to complete.[51] Two years later, at its 1996 Session, the Commission adopted the final Draft of its 'Code of Crimes against the Peace and Security of Mankind'.[52] The Draft Statute of 1994 and the Draft Code of 1996 played a seminal role in the preparation of the Statute of the International Criminal Court. The Draft Statute of the International Criminal Court was indeed a commendable and unique effort.

1.4.5.9 Establishment of Ad-hoc Tribunals

While the Draft Statute of an International Criminal Court was being considered in the International Law Commission, events compelled the creation of two separate Courts on an ad-hoc basis in order to address the atrocities and violations of International Humanitarian Law being committed in Yugoslavia and Rwanda. The two ad-hoc Tribunals are to deal with Genocide and Crimes against Humanity such as murder, extermination, enslavement, imprisonment torture, rape, persecution on political, racial and religious grounds and other human acts.[53] In the provision of competency of the ad-hoc Tribunal, it has been stated that the International Tribunals shall have the power to prosecute persons responsible for serious violations of International Humanitarian Law committed in the territory of former Yugoslavia.[54] On 24 November 1994, acting on a request from Rwanda, the Security Council voted to create a second ad-hoc Tribunal, charged with the prosecution of Genocide and other serious violations of International Humanitarian Law committed in Rwanda and in neighbour countries during the year 1994.[55] Its Statute closely resembles that of the International Criminal Tribunal for the former Yugoslavia (ICTY).

1.4.5.10 Establishment of the International Criminal Court

The two ad-hoc Tribunals gained on the whole world wide recognition and credibility. Nevertheless these tribunals have been limited to specific geographical locations and a specific time frame, these tribunals did enjoy varying degree of success, they are still engaged in the further investigation of war criminals in the former Yugoslavia and Rwanda. Even then there was a great need of a unified structural machinery to implement the rules and regulations regarding international crimes and punish the perpetrators and executors of these crimes. To solve this

---

50 See Report of the International Law Commission (46th Session), UNGAOR, 49th Session, Supp. No. 10 UN Doc. A/49/10 1994.

51 William A. Schabas, *An Introduction to the International Criminal Court,* Cambridge University Press (2001), p. 10.

52 John Allain and John R.W. D.Jones, "A Patchwork of Norms", A Commentary on the 1996 the Draft Code of Crimes Against the Peace and Security of Mankind, *European Journal of International Law,* 1997.

53 For the Text, see Article 4 and 5 of the Statute of the Tribunal for Former Yugoslavia. See also Malcolm D. Evans (ed.), *Blackstone's International Law Documents,* 4th Edn., Universal Law Publishing (2000), pp. 379-80.

54 *Ibid,* p. 378.

55 UN Security Council's Resolution 955 (1994) of 24 November 1994.

problem, the International Criminal Court (ICC) was established in 1998 by adopting the Rome Statute by the International Community. The ICC has jurisdiction over four core crimes like War Crimes, Genocide, Crimes against Humanity and Crime of Aggression. The cases and situations before the ICC are the Northern Uganda, Democratic Republic of Congo, Central African Republic, Darfur(Sudan), Republic of Kenya, Libyan Arab Jamahiriya and Republic of Cote d'Ivoire in respect of those the court is taking action. The Rome Statute contains a comprehensive codification of genocide, war crimes, crime against humanity. The Court cannot exercise its jurisdiction over the crime of aggression until the Statute has been amended by the addition of a definition of that and inclusion of preconditions for the ICC to take jurisdiction.[56] The ICC takes an important step towards global accountability for all, irrespective of official capacity of political and military leaders. The Court has only jurisdiction with respect to crimes after the entry in to force of the Statute. In other words the court does not have retrospective operation.

The Court has granted four mechanisms to its jurisdiction; if the accused is a national of a state party to the Rome Statute; if the alleged crimes took place in the territory of a state party;[57] if a situation is referred to the Court by the UN Security Council and if a state not party to the Statute accepts the jurisdiction of the Court.[58] The Court can exercise its jurisdiction through three ways i.e. the Security Council may refer the case to the Court acting under Chapter VII of the UN Charter;[59] State Party may refer the case to the Court[60] and the Prosecutor himself initiates the investigations in respect of such crime. The ICC has jurisdiction over the suspected persons based on the concept of universal jurisdiction for the covered crimes.[61] It is important to note that Court's jurisdiction is complimentary to that of national courts. So that state sovereignty can be maintained. The ICC will try cases only when the States with custody of the accused is unable or unwilling genuinely to prosecute.[62] The prosecution by the Court can only be suspended or deferred for a period of 12 months, when the Council by a resolution passed under Chapter VII of the UNs Charter requests the Court to this effect.[63] The ICC is a permanent tribunal to prosecute individuals. In June 2010, two amendments were adopted by the Review Conference in Kampala, Uganda. The first amendment criminalizes the use of certain kinds of weapons in non-international conflicts whose use was already forbidden in international conflicts. The second amendment specifies the crime of aggression. It has not yet ratified by any state party. The ICC will not be allowed to prosecute for this crime until at least 2017. We hope that at the time of Review Conference in 2017 on the Rome Statute, shortcomings would be checked and removed in the Rome Statute. The ICC is the first permanent international court in the history of mankind

56 Rome Statute, Article 5(2).
57 *Ibid,* Article 12(2) (a and b).
58 *Ibid,* Article 12(3).
59 *Ibid,* Article 13(b).
60 *Ibid,* Article 13(a).
61 Rome Statute's Preamble recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.
62 *Ibid,* Article 17.
63 *Ibid,* Article 16.

to provide international criminal justice. In the sixteen years since the adoption of the Rome Statute of the International Criminal Court one hundred and twenty two States has ratified the Rome Statute.

1.5 Conclusion and Suggestions

Various Conventions and Conferences were held time to time for the suppression of international Crimes. These were significant milestones for suppressing the crime of hijacks, genocide, war crimes and crimes against humanity etc. Although the implementation of these crimes was very limited and weak but these were more helpful for the evaluation and development of International Criminal Law. Military tribunals and two ad-hoc tribunals were established for trying individuals and punish them who were guilty of war crimes, genocide, crimes against peace and humanity. For decades, international law lacked sufficient mechanism to hold individuals accountable for the most serious International Crimes. The problem was that when the most serious crimes were committed the national courts were least interested to act. The reason was involvement of agents of the concerned states in the commission of crimes. If we look at the serious crimes committed in- Nazi Germany, the former Yugoslavia, Rwanda, Cambodia, Sudan and Libya. The governments themselves or their agents were involved in the commission of these crimes. The Ad-hoc tribunals had serious deficiencies, weaknesses and limitations. They were not only concerned with specific conflicts but were also created only by few parties. As a result, the ability of ad-hoc tribunals to punish perpetrators of international crimes and to deter future perpetrators has been limited. To solve this problem and for the purpose of providing just and fair criminal justice to the aggrieved party, the International Criminal Court has now been established as a permanent institution having jurisdiction over persons for prosecution of most serious crimes of international concern. In the history of criminal justice the ICC is making a considerable advancement in the struggle against impunity for crimes against humanity.

For the suppression of international crime some suggestions are given:

- To put an end to impunity the most serious crimes to achieve justice there should be universal ratification and compulsory jurisdiction over international crimes;
- Co-operation from International Organizations particularly the United Nations should be insured. The ICC does not have any enforcement power.
- The primary support and co-operation for the court's activities must come from state parties as well as non party states.
- There is utmost need of international community for inclusion of terrorism, the crime of hijacking, money laundering, illicit drug trafficking and violent street crimes within the jurisdiction of the court.
- The Security Council should not be allowed to interfere in the judicial activities of the court through veto power to block the ICC's initiatives.
- To achieve international peace and security, international community must think about enhancing the membership of Statute of the ICC.

- Last suggestion is for India. India should join the International Criminal Court. Moreover in present time India has need the ICC for the suppression of crimes in India.

We hope that in near future the other serious International Crimes also would come under the jurisdiction of the court, and international community would feel more secure. An effective organ of international justice is not only a necessary feature of one global society but also a moral imperative.

IMPRISONMENT AS A PUNISHMENT : LEGAL AND ETHICAL ISSUES

Ivneet Walia*

1.1 Introduction

The criminal justice system is not a structure which has been planned as a system. The administration of criminal justice has grown in a piecemeal way over the years, with separate phases of development leaving their mark. The system encompasses a whole series of stages and decisions, from the initial investigation of crime, through the various pre-trial processes, the provisions of the criminal law, the trial, the forms of punishment, and then post-sentence decisions for example, supervision, release from custody and recall procedures.

A person who pleads guilty or is convicted of a crime normally faces punishment. Of all the ethical issues in the criminal justice system, punishment, at least as a general response to the wrongdoing, is the topic that is most thoroughly explored. Whereas finding of guilt is on violation of Penal laws definitions offences, the, punishment is expressive, it communicates censure or condemnation. It denounces what was done and to some degree stigmatizes the doer. That for which people are said to be appropriately punished reflects on their moral character, either on a persisting flaw that has issued in the condemned conduct or on a lapse that is expressive of weakness of will. We punish people for wrongdoing, where the wrongdoing involves some form of moral defect or discredit. We are penalized for over parking or driving with an expired vehicle registration; such administrative penalties are not usually seen as punishment for crime because they are not thought of as involving moral dereliction. The crimes of theft and assault, on the other hand, are believed to involve moral wrongdoing.[1]

Historically, determinations of the seriousness of an offense and hence the severity of the penalty to be imposed have been left mostly to judicial discretion. The presumption being that judges are professionally skilled at making such determinations. Though this may have worked tolerably well when liberal democratic societies were more homogeneous. It has increasingly led to bizarre sentencing disparities. To counter this, many countries have developed sentencing guidelines that provide relatively uniform criteria for sentencing. Until such guidelines recently became advisory rather than mandatory, discretion was often quite limited, even though a range of penalties was indicated. Sentence maxima are specified, and various factors, such as the degree of culpability, the seriousness of the harm, recidivism, and other aggravating or mitigating circumstances are weighted in an almost algorithmic way. But although the vagaries of individual judicial discretion may have been lessened, the results have not always inspired confidence in the justness of outcomes. Even without the anomalies, sentencing guidelines have not cured the most critical moral difficulties involved in determining what sentences should be. The classic solution to the matching problem has been to argue for some kind of "equivalence" of offense and penalty. Traditionally known as the *lex talionis*, it is exemplified more or less in the biblical injunction to

---

* Assistant Professor of Law, Rajiv Gandhi National University of Law, Punjab.

1 John Kleinig, *Correctional Ethics,* Cambridge University Press, Cambridge (2006), p. 195.

"give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.[2]

However except for its frequent invocation in favor of capital punishment the *talionis* principle is not generally intended so literally. What is argued for is some parity or equality of value between the offense and what is exacted by way of punishment. At one point in its deliberations about "cruel and unusual punishment," the US Supreme Court spoke of a need to be responsive to "the evolving standards of decency that mark the progress of a maturing society." Is there something less dignified about putting someone to death than the usual alternative incarcerating him for the rest of his natural life that is life imprisonment without parole. Some methods of execution are clearly dehumanizing or degrading, and it may be possible to argue that even more clinical methods, such as lethal injection, are unseemly, though Kant's demand that the death of the murderer "must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable" is not obviously incoherent. There are some real difficulties with the penal status quo.

Imprisonment has become a convenient but unsatisfactory social response to many crimes. It does not seem to fit the crime in many cases, and frequently leaves victims feeling dissatisfied. For victims as well as offenders, the processes of criminal justice have become alienating overreliance on imprisonment especially in the United States it has been recognized for a long time though to relatively little effect. In some cases particularly involving juvenile and drug offenses, diversionary programs and probation are resorted to, or community service. But in addition to these internal adjustments to the correctional system, there has also begun to emerge an alternative to current penal practices that goes under the name of "restorative justice." To speak of it as an "alternative" is not completely accurate. Restorative practices are sometimes used to supplement traditional penal responses, often as an adjunct to imprisonment. For some theorists of restorative justice, however, restorative practices are consciously crafted in opposition to punitive responses. Critics of restorative justice have sometimes complained that whatever are the failures of the criminal justice system there should be no deep opposition between restorative and retributive justice. Indeed, it is sometimes claimed that a morally acceptable restoration requires that offenders accept their guilt and be prepared to suffer punitively for what they have done. Further, it is claimed that even though victims ought to receive redress for what was done, the offense itself was not merely a private wrong against the victim but also a public offense against standards recognized and established by the community or state. It should therefore not be left to the victim and offender to work out what the terms should be for the violation of what was also a communal standard.[3]

---

2 John Kleinig, *Punishment and Desert,*Martinus Nijhoff, The Hague (1973), p.48. Also see, R. A. Duff, *Trials and Punishments,* Cambridge University Press, Cambridge (1986); Nicola Lacey, *State Punishment: Political Principles and Community Values,* Routledge, London (1988).

3 Richard L. Lippke, "Against Supermax", *Journal of Applied Philosophy,* (2004), pp. 109-124. Also see, United Nations, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (UN), 2000, available at <www.restorativejustice.org/rj3/UNdocuments/UNDecBasicPrinciplesofRJ.html>.

2.1 Imprisonment as Punishment

The prison is such a familiar institution that it is easy to forget how recently it has been socially normalized after fines, our most frequently used form of punishment. In the wake of exposes of prison brutality and neglect, it is also easy to forget that imprisonment along with transportation was originally advocated as a more humane enlightenment alternative to corporal and public punishments. As attitudes toward the body changed, confinement albeit often with incapacitating forced labor became the favored penalty. Subsequently, mostly under the reformist influence of religious dissenters, the penitentiary was introduced as a vehicle for remorse and rehabilitation. The transition was not rapid or smooth provisions for whipping and flogging in England and the United States lasted until the middle of the twentieth century. Moreover, despite successive attempts at reform, prisons in certain countries have only rarely lived up to the rehabilitative goals envisioned for them, often becoming little more than cheap labor pools or convenient warehouses for societies that have been unable or unwilling to address the problem and causes of crime in a more constructive manner.[4]

The simple practical justification of imprisonment was that it ensured control of those facing trial or deemed appropriately punished. We cannot assume that those contemplating or in receipt of a conviction will readily accept its burden. Confinement resolves the issue: it ensures that those who face trial will be present and, in the case of those who have been convicted, it ensures that punishment will be carried out. Imprisonment and the broad conditions of confinement are, after all, state mandated.[5] Imprisonment in particular, and not only punishment in general, is often said to be justified because it serves legitimate state purposes such as rehabilitation or deterrence. As the name suggests, the *penitentiary* was originally intended to provide a solitary environment away from the corrupting influence of others that would lead offenders to reflect on the nature of their misdeeds, bring them to repentance, and thus prepare them to act in a socially responsible manner on release. Within such institutions, hard labor and strict discipline were often thought to increase prospects for law-abidingness and social responsibility. Later named *reformatories* were oriented to similar, though less religiously tinged, purposes. That name is now generally reserved for juvenile detention facilities. The jails and prisons are still commonly referred to as *correctional facilities* the intended implication being that they will rehabilitate or "straighten out" those who are admitted to them. In each case, the state seeks to legitimate the penal institution by reference to certain outcomes. The failure of this somewhat disingenuous appeal to the rehabilitative value of prisons is not usually sufficient to disabuse their supporters of belief in the legitimacy of punishment by imprisonment. For when one justificatory outcome fails to be realized, another can be introduced to take its place. If prisons are not rehabilitative, then surely they will deter. Deterrence is a much more slippery notion than rehabilitation. There is of course the shuffle back and forth between specific and

4 *Ibid.*

5 Richard L. Lippke, "Prison Labor: Its Control, Facilitation, and Terms," *Law and Philosophy,* (1998), pp. 533-557.

general deterrence, that is, between deterrence from future offending of those who have been imprisoned and deterrence of others who might otherwise have offended.[6]

3.1 Fallacy of Imprisonment as Punishment

If we are really interested in rehabilitative punishment, then, for a significant proportion of those who are currently imprisoned, there are almost certainly more effective ways of achieving rehabilitative goals. In recent years, there has been some acknowledgment of this in the greater use of community-based sanctions, drug courts, restorative justice practices, and other diversionary programs. Nevertheless, imprisonment remains the punishment of choice and, given how deeply it has embedded itself in the politics and economics of our society. The foregoing criticisms of consequentialists arguments for imprisonment do not amount to an argument for its abolition. But they constitute reasons for diminishing reliance on imprisonment as a medium for punishment. The apparent value of imprisonment is that it gives the state control over what it seeks to accomplish through punishment. More to the point, in many cases ample control can be exercised using alternative means of punishment. For many offenders, house arrest, the attachment of electronic monitoring devices, intensive probation, mandatory attendance at treatment programs, and supervised community service might provide as much control as is required as well as the opportunity for more productive intervention. It is easy to forget that a large number of the incarcerated are confined for minor offenses such as drug possession and use.[7]

Still, this may not be enough to allay the worry that there is something intrinsically unacceptable about imprisonment as a particular constraint on liberty. Freedom of movement, access to certain qualities of human intimacy, privacy, and control over one's everyday affairs are so central to human dignity that their contraction might be seen as inherently dehumanizing. It is not; after all, simply that one's liberty of movement is constrained. Along with the constraint on movement that imprisonment involves, many other restrictions are imposed. However, it is arguable that the constraint constituted by imprisonment is a matter of degree. At one extreme, were imprisonment to involve confinement to a straitjacket-like existence, this would surely dehumanize. At the other end of the spectrum, some low security prisons allow for significant social interaction, reasonable privacy, and engagement in aspects of the life one had on the outside.[8]

"Graying" of the prison population has become a serious matter. With larger numbers in prison serving longer sentences, with diminished access to parole, a sizable number of prisoners now die in prison. Most prisons were not built with that in mind and so they do not usually have hospice facilities. In some prisons,

6 Robert Johnson and Shelley Price, "The Complete Correctional Officer: Human Service and the Human Environment of Prison," *Criminal Justice and Behavior*, 1981, pp. 343-373.

7 Norval Morris, *The Future of Imprisonment,* University of Chicago Press, Chicago (1974), p. 86.

8 Robert Johnson and Shelley Price, "The Complete Correctional Officer: Human Service and the Human Environment of Prison," *Criminal Justice and Behavior*, (1981), p. 76.

though, inmates have been trained to be hospice carer. Compassionate release is one option.[9]

There are views that community-based sanctions appear to be no more likely to result in recidivism than imprisonment. But even if it is thought that a person is inclined to err again, constraints other than imprisonment such as electronic monitoring, house arrest, and intensive supervision might be considered before imprisonment. Although confining, these do not amount to imprisonment and, for many offenders, may just as adequately deter as any imprisonment especially if a repeated failure is accompanied by the threat of imprisonment. These constraints could also be associated with various restitutive or community penalties. The analysis of crime patterns suggests that for many who engage in criminal activity, criminality represents a phase rather than a settled disposition. Even if, given the social potency that the fear of crime possesses, we might err on the side of caution; our tendency to overestimate the risk of re-offending should give us pause before we determine that incarceration would be justified.[10]

4.1 Ethical and Human Concerns

The United Nations *Universal Declaration of Human Rights* (1948) and *the European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953), mentions that the prohibition is of "cruel, inhuman or degrading" and is "inhuman and degrading" punishment. *Cruelty*, which involves the intentional or maybe reckless infliction of physical or mental suffering on a weaker person, disproportionate to whatever suffering might have been justified as punishment, is inhuman because it displays a failure of regard for one of the basic requirements for human interaction. A basic moral requirement for our interactions with others is recognition of their oneness with ourselves as feeling, perceiving, and reasoning beings, and giving their feelings, perceptions, and reasons the same weight that we give to our own. Those who act cruelly assault that connectedness by causing pain and fear. Their infliction shows a disregard for, as well as a tendency to undermine, the qualities that constitute our human distinctiveness. The pain of cruelty threatens to reduce us to the level of what we may characterize as animalism. It may even be worse than that, because physical and mental cruelty often exacerbate suffering through an exploitation of the imaginative possibilities of our human consciousness.[11]

Against this background of constraints on imprisonment, we can identify a number of prison practices that are often morally, if not legally, questionable. Although these are usually explained as security needs, and in certain circumstances may even be justifiable as such, their practice often reflects less admirable concerns, born of the imbalance of power and the environment of disgrace that characterize prison life.

---

9 Margaret Leland Smith, *Community, Discretion, and Correctional Ethics,* Rowman & Littlefield, Lanham (2001), pp. 150-168.

10 Nicola Lacey, *State Punishment: Political Principles and Community Values,* Routledge, London (1988), p. 78.

11 R. A. Duff, *Punishment, Communication, and Community,* Oxford University Press, New York (2000), p. 146.

Excessive use of solitary confinement, lockdowns, unnecessary and humiliating strip, body cavity, and pat searches, long delays in processing calls for medical assistance, allowing prison conditions to become squalid, turning a blind eye to prisoner-on-prisoner abuse, chain-gang practices, and even institutional boredom, sometimes individually and often collectively violate ethical even if not legal, demands that imprisonment not be cruel, inhuman, or degrading.[12]

We need to remind ourselves that people are sent to prison *as* punishment and not *for* punishment. Conditions need not be easy, but neither should they be unduly harsh. There is often an unspoken commitment to a doctrine of penal austerity, that is, to the view that conditions inside prison should be no better than those an inmate would experience on the outside. Although prisoners are usually allowed to leave their cells for limited periods each day, much of their time is spent in cells equipped with basic necessities bed, toilet, washbasin, and maybe a few other amenities. But cells may be too small, too exposed, too hazardous, and too uncomfortable to be humane. There should, therefore, be sufficient space to allow for certain basic activities such as standing up, walking round, sitting, lying down and, compatible with the need for security and safety, the cell environment should allow for the retention of dignity and a reasonable degree of well being.[13]

In addition, of course, there are some basic amenities to which every prisoner should have access such as a disease-free bed, a place to write, and sanitary toilet and washing facilities. These, though, are mostly physical requirements. One of the most serious deficiencies in prison life is the lack of mental stimulation and preparation for life on the outside. And so there is a strong argument for access to current information about the wider social world, library facilities, discussion and learning opportunities, and other stimuli that may help to overcome the nagging sense of worthlessness possessed by many inmates. In addition, given that many prisoners will be engaged in legal activity concerning their cases, they should have reasonable access to essential legal materials. Medical, psychiatric, and social work amenities should be readily accessible.[14]

In determining that imprisonment as an appropriate punishment, we need to see the impact that imprisonment will have on values of others. If the person who is imprisoned was significantly responsible for family income or family stability, incarceration will place great strains on those who remain outside. Although this may not count decisively against imprisonment, it may especially in view of the need for future social reintegration and constitute a strong reason for providing counseling services and for making access easier and more productive than it usually is. In some countries this extends to private conjugal visits. Although they may pose security risks and present other problems pregnancy, for example, their longer-term benefits

---

12 Igor Primoratz, *Justifying Legal Punishment*, Humanities Press, Atlantic Highlands, New Jersey (1999), p.68.

13 Alison Liebling, Helen Arnold, *Prisons and Their Moral Performance,* Clarendon, Oxford (2004), p. 78.

14 W. Haan, *The Politics of Redress: Crime, Punishment and Penal Abolition,* Unwin Hyman, London (1990), pp. 56-108.

should not be ignored. In most cases, though, and in general with issues of visitation and access, the security issues are overplayed.[15]

1.2 Conclusion

The penal statues provide different kind of punishment and with quantum and nature as may be appropriate. In all the punishment the imprisonment as such is most prevalent, for though courts are given discretion to determine the punishment in individual cases yet we are not sure of the impact or effect of such imprisonment. One penological value of imprisonment is not uniform in all cases rather in some cases this is more inappropriate. This to involve ethical and moral issues in execution of imprisonment therefore alternatives to imprisonment need to be applied in appropriate cases.

Although we might hope for a diminished reliance on imprisonment, we cannot expect to see prisons vanish from our social landscape. For even were we to devise alternative penalties for many of the offenses and offenders now attracting prison sentences, there would almost certainly be a group of those for whom imprisonment would remain the most appropriate penalty. Unfortunately, as is implicitly recognized in the more radical critiques of prisons, imprisonment is now deeply etched into our way of doing things, and though we might reasonably work, on the one hand, to diminish our dependence on it and, on the other, to improve conditions through increased accountability, imprisonment will no sooner become a marginal instrument in our social response to crime. We should work toward the greater professionalism of those who administer prisons.

[15] Robert Johnson and Shelley Price, "The Complete Correctional Officer: Human Service and the Human Environment of Prison," *Criminal Justice and Behavior,* (1981), pp. 343-373.

THE NUREMBERG TRIBUNAL AND CRIME OF AGGRESSION: AN ANALYSIS

Geetika Walia*

1.1 Introduction

Violence in any form is a pathological force, which obstructs or destroys life-sustaining and life-enhancing processes. The history of human civilization is replete with the instances of violence against fellow humans. The present age described as the age of science and technology, globalization and liberalization has equally brought in its wake new forms of commission of grave and heinous crimes at the international level. It poses a challenge to the reinforcement of the rules of international law for making the globe a better, happy and peaceful place to live in.[1]

From the comparative study of the history of the world regarding criminal activities that have occurred in past centuries, it may be deduced that international criminal activities are growing at a fast pace. This is posing an alarming threat to the peace and security of the world due to unprecedented increase in international criminal activities.[2] During the course of twentieth century, it has been estimated that conflicts of a non-international character, internal conflicts and tyrannical regime victiminization has resulted in over 170 million deaths. Apart from the problem of war, various new technologies have been invented and employed for destruction. New methods have been evolved to create fear and terror in the minds of people. All these offences are against human rights, humanitarian law and thus against international law also. Therefore, it may be inferred that the security of international community and whole world is at stake and steps have to be taken to curb this menace.

In the light of the arguments put above, the obvious question is how to curb crimes against human rights and humanitarian law and broadly against the international law? The logical answer is "by punishing the offenders one can curb these crimes". This curbing of international crimes by punishing the offenders was done by setting up tribunals to punish the perpetrators of the crime.

The purpose of this paper is to provide an objective, analytical overview of the history and major developments prior to the adoption of the Charter of the United Nations and the subsequent developments after that for the maintenance of international peace and security. It includes the constituent instruments and the jurisdiction of the tribunals those tried the crimes against peace, namely the Charter and the judgment of the Nuremberg Tribunal, which was established to try major war criminals in Europe; and the Charter and the judgment of Tokyo tribunal, which was established to try the major war criminal in the Far East. Further an attempt is made

---

* Assistant Professor of Law, Rajiv Gandhi National University of Law, Punjab, Patiala.

1 Anupam Jha, "Challenges Before International Criminal Tribunals: A Special Focus on International Criminal Court", *ISIL Yearbook International Humanitarian and Refugee Law*, Volume III, New Delhi, 2008, pp.178-193, p. 178.

2 M. Cherif Bassiouni (Edt), *International Criminal Law*, Transnational Publishers, Inc. Ardsley, New York (2000), p. 3.

to have an in depth study of the concept of aggression and how these tribunals have penalized various acts of aggression.

2.1 Historical Background: The Importance and Meaning of Nuremberg Precedent

Earlier the world which existed was in which nation states ruled supreme. It was a world filled with armed conflicts between sovereign nations which brought about death and destruction. It was a world in which international law, such as it was, imposed no effective restraints on nation-States and their leaders in starting and carrying out aggressive wars. It was a world in which there were no restraints on national leaders in doing as they pleased in their dealings with other states. It was a world in which individuals had no standing under international law to charge nation-states with violations of their rights as human beings. It was a world in which individuals had no effective obligations under international law as heads or leaders of nation-states. Individuals in the pre-Nuremberg world had no obligations to conduct themselves in such a way as not to injure the citizens of other nations. In short, it was a world in which international anarchy was the order of the day.

To add to this the enormous human rights violations and the acts of aggression that took place in the World War II made a profound change in the international criminal legal regime. International community was cajoled to come up with some concrete agenda on international criminal law as a result of which International Military Tribunals at Nuremberg and Tokyo were established. For the first time in the history of human civilization, individual criminal responsibility was recognized at the international level for the crimes committed.[3]

These International criminal tribunals, along with their constitutive instruments, evoke a number of justifications for why they punish perpetrators of extraordinary international crimes which included aggression. These justifications include retribution, deterrence, and expressivism and, on a subaltern level, rehabilitation, reintegration, reconciliation and incapacitation.[4]

The emerging system of international criminal law, with its foundations in the Nuremberg and Tokyo Tribunals judgment, confirmed the fact that steps have to be taken to bring acts of aggression under the list of crimes under international law. As the main component of aggression was the use of force so the states and the individuals should be prohibited to the use of force which would be contrary to *jus contra bellum.*

3.1 Meaning of Tribunal

Any conflict between two or more States not only involves the military apparatus of that State but also the political leadership of the State. It is the military leadership which has the legitimate ability to command the military. For a State to go into a state of war involves concerted political and military efforts. The question about

---

3 *Ibid.*

4 Mark A. Drumbl, "The Push to Criminalize Aggression: Something Lost Amid the Gains?", *Washington and Lee University - School of Law*, Volume 41, 2009, pp. 291-319, p. 311.

whom to make a person liable for aggression can only be answered when the elements of aggression are determined. It is important to note here that the road to actualization of international criminal tribunal for the liability of aggression was long and twisted one. For doing this tribunals were established. An important question which arises here is how we define a tribunal.

The meaning of term "Tribunal" is a seat or court of justice or the bench on which a judge or other presiding officer sits in court or a committee or board appointed to adjudicate in a particular matter or it also means something that has the power to determine or judge. The basic purpose of establishing of these tribunals was to establish "a system of accountability and the maintenance of international peace and security".[5] The purpose of the tribunal is "to put an end to [international atrocities] and to take effective measures to bring to justice the persons who are responsible for them.[6] The basic reason for the establishment as rightly put forth was "[t]he pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts."[7] It also became fundamentally important for these tribunals to address to the rising concerns of international criminal activities and one of it being aggression. Because of the reason that these tribunals were not established led to mass violations of the human rights of the people. To add to this the millions of victims of humanitarian atrocities provide "grim testament to the failure of the international community to . . . prevent aggression and enforce international humanitarian law."[8] So it became all the more necessary to establish such bodies that could adjudicate and make people liable for the atrocities including the acts of aggression.

4.1 The Nuremerg Tribunal

Since civilization began some 5,000 years ago, the Law of Force had been the order of the day. We should never forget that the Law of Force is barbaric, fleeting, and creates tremendous uncertainty on the part of the populous. It means that highly cultured, peace-loving people could be and have been destroyed by foreign and domestic predators that recognize no limits to their behavior. Albert Speer, a prime defendant at Nuremberg, recognized the dilemma created by acceptance of the Law of Force. In his closing statement at Nuremberg he graphically expressed his concern over a future in which some nations devoted their efforts to producing greater weapons of destruction while others focused on cultural growth and peace loving pursuits. He hoped that Nuremberg would ensure that the growth of international law kept pace with increases in the technology of destruction.[9]

---

5 Akhavan, P, 'Justice in The Hague, Peace in Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', *Human Rights Quarterly*, Volume. 20, 1998, pp 738-817.

6 S.C. Res. 827, at 1, U.N. Doc. S/RES/827 (May 25, 1993), available at http://www.un.org/Docs/scres/1993/scres93.htm (follow link for "Resolution 827") accessed on 1/November/2013.

7 M. Cherif Bassiouni, "Justice and Peace: The Importance of Choosing Accountability over Real Politik", *Case Western Reserve Journal International of Law*, Volume 35, 2003, p. 191.

8 Leila Nadya Sadat & S. Richard Carden, "The New International Criminal Court: An Uneasy Revolution", *Georgetown Law Journal*, Volume 88 (2000), p. 381.

9 Henry T. King, "Without Nuremberg-What?", *Washington University Global Studies Law Review*, Volume 6, 2007, pp. 653-661, p. 654.

Nuremberg was designed to change the anarchic context in which the Nations and peoples of the world related to each other. Nuremberg was the fountainhead from which initiatives for the protection of human rights emanated. The European Convention on Human Rights,[10] the Genocide Convention,[11] the Universal Declaration of Human Rights,[12] and other similar initiatives were all outgrowths of Nuremberg. Nuremberg was the first post-mortem analysis of a totalitarian State. It gave the world an appreciation of the levers of power in a dictatorship and of the defenses which have to be in place to prevent dictatorships and their destructive effects.[13]

Nuremberg is not just a city in Germany. It is a symbol, a symbol of renaissance, rebirth, and revival of Natural Law from dormancy. The Nuremberg Trials make us know the power of Natural Law and the power of Justice.[14] It marked a beginning or a new era in which principles were laid down where individuals and nation states would be guided by a set of enforceable rules in their behavior towards one another. It foreshadowed a new golden era in human history. In a real sense it marked the coming of international law as a force to be reckoned with on our planet for maintaining peace. Nuremberg was designed to replace the law of force with the force of law. It was designed to demonstrate to the world that there was, indeed, a better way in which peace, justice, and security in the world could be secured by a rule of law. Nuremberg modernized the laws of war and created a denominator under which all citizens of the world could live and be judged. In so doing, Nuremburg launched the international human rights movement.

5.1 Establishment of Nurmeburg Tribunal

The process to establish an international criminal tribunal for the trial of Nazi criminals started during the Second World War itself. It was during this time that the states started looking into the perspective of making aggression an international crime. The Nuremberg Trials established the modern Laws of War and laid the foundation for the ad hoc international tribunals established in the past fifteen years, as well as the permanent International Criminal Court (ICC). The establishment of tribunals to try offenders was indeed a revolutionary concept for maintenance of international peace and security. It was established by the United Kingdom of Great Britain, North Ireland, the United States of America, France and the Soviet Union by an agreement signed at London on 8 August 1945.[15] The Charter of the Tribunal laid

---

10 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter Convention for the Protection of Human Rights and Fundamental Freedom.

11 The Convention on the Prevention and Punishment of the Crimes Against Genocide (1948).

12 Universal Declaration of Human Rights, Art. 21, GA. Res. 217 (III), UN Doc. A/810 (1984).

13 *http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1218&context=twlj* accessed on 14/November/2013.

14 Zhang Wanhong, "From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial", *Cardozo Law Review*, Volume 27, 2005-2006, pp. 1673-1682, p.1673.

15 Agreement for the Prosecution and Punishment of the Major War Criminals of the Europeans Axis, United Nations, *Treaty Series*, Vol. 82, p. 279 (hereinafter London Agreement); Charter of the International military tribunal, *Treaty Series*, Vol. 82, p. 284 (hereinafter Nuremberg tribunal).

down that "In pursuance of the Agreement signed on the 8th day of August, 1945, by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal ... for the just and prompt trial and punishment of the major war criminals of the European Axis..."

The significance of Nuremberg was multilateral recognition (i.e., United States, U.S.S.R., France and the United Kingdom) of international human rights extending beyond the borders of individual countries.[16] The Charter of the Tribunal recognizes three kinds of crime, charges on all of these were put in the indictment:

1. Crimes against peace,
2. War crimes, and
3. Crimes against humanity.

If we try to make an analysis of the Nuremberg trials it can be deduced that the trials rested on two fundamental principles which was namely,

1. Individuals can and should be held accountable for the most serious international crimes. The judgment of the Nuremberg Tribunal famously declared, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."
2. Ensuring accountability is important in itself, but it is also important because allowing impunity for widespread or systematic atrocities can have serious consequences for international peace.

Some other principles attached to the Nuremberg Trial which were valid then, and they remain so today are as follows:

1. That the initiation and waging of aggressive war is a crime as is a conspiracy to wage aggressive war;
2. That the violation of the laws and customs of war is a crime;
3. That the inhumane acts committed upon civilians in execution of, or in connection with, aggressive war constitutes a crime;
4. That individuals may be held liable for crimes committed by them as heads of state;
5. That individuals may be held liable for crimes committed by them pursuant to superior orders;
6. That an individual charged with a crime under international law is entitled to a fair trial.

[16] King Jr., H, "Nuremberg and Sovereignty", *Case Western Reserve Journal of International Law*, Volume 28, 1996, 135-140 at p. 135.

6.1 Aggression and Nurembeg

It is very important to note here that because of the acts of aggression increasing it became all the more evident to give a definition to this terminology. To add to this as William Schabas observed:

"[It] is certainly striking to observe that the uncertainty about the role of aggression within the overall system of international criminal law is not only characteristic of the debate that immediately preceded Nuremberg, but it is also manifested in the approach to the issue in the decades that were to follow the landmark trial. The failure of the United Nations War Crimes Commission to even take a position on whether or not aggressive war should be a crime seems remarkably like the hesitations at the Rome Conference [on the International Criminal Court], more than half a century later."[17]

The inclusion of the crime of aggression in both the Nuremberg and the Tokyo Trials was one of the most important and remarkable development in the field of international criminal law. There is lot of extraordinary and intellectual inputs made in the form of legislative history of the crime of aggressive war. But the inclusion of aggression in the legal framework for the trial of aggression was started by drafting the Kellogg- Briand Pact, 1928. This instrument can be taken to be the beginning of the making of crime of aggression on which all the other instruments have relied upon including the Nuremberg Charter.

To begin with Robert H. Jackson explained the legal basis for the inclusion of the crime of aggression within the jurisdiction of IMT as follows:

> International law ... is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act ... Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a new and strengthened International Law.[18]

This analysis was done by Robert H. Jackson keeping into consideration the pacts entered into after the First World War.[19] If the analysis of the Charter of IMT is done the provisions on the crime of aggression were the result of much debate and disagreement between Britain, the US, France and Soviet Union. These States had to agree on a compromise text in the end. The differences were more than just political, or strategic, they were also dogmatic. While US regarded aggressive war to be criminal *per se*, France wanted the Charter provisions on aggression to be linked to violations of treaties and other international instruments (to avoid problems of retroactive application of criminal law). Incidentally, references to 'violations of treaties' would also relieve the drafters of having to define aggression. Further their

---

17 Mauro Politi, Giuseppe Nesi(eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate Publication House, England, 2005, p. 31.

18 *http://www.derechos.org/peace/dia/doc/dia33.html* accessed on 17/November/2013.

19 These pacts were the Kellogg- Briand Pact (1928), the Geneva Protocol (1924), the Assembly of the League of Nations Resolution (1925 and 1927) and the Resolution of the American States (1928).

arose two views against the liability of aggression; one of Soviet Union which came out strongly in the support of making the Nazi's liable for the acts of aggression they had committed and recommended a "Show Trial" and the other view which was held by Americans which contended that there should be a formal trial. Because of the compromises necessitated by the different dogmatic positions taken by the four Allied States, the final provisions on the crime of aggression in the IMT Charter were – in the words of Ian Brownlie[20] – a 'clumsy formula'. Indeed, this formula was the result of different, but valid, concerns about the content of a crime that was at that stage all but established under international law. The French concerns about retroactivity proved to be relevant, because the application of the law on aggression by the IMT was one of the main criticisms against the judgment at Nuremberg.[21]

Specifically speaking Principle VI of the Nuremberg Tribunal deals with the concept of aggression and it states that:

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

The Tribunal made a general statement to the effect that its Charter was "the expression of international law existing at the time of its creation". It, in particular, refuted the argument of the defence that aggressive war was not an international crime. For this refutation the tribunal relied primarily on the General Treaty for the Renunciation of war of 27 August 1928(Kellogg- Briand Pact) which in 1939 was in force between sixty- three states. "the nations who signed the Pact or adhered to it unconditionally", said the tribunal, "condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who planned and waged such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact".[22]

In support of its interpretation of the Kellogg- Briand Pact, the Tribunal cited some other international instruments which condemned war of aggression as an international crime. The draft of Treaty of Mutual Assistance sponsored by the League of Nations in 1923 declared in its Article 1, "that aggressive war is an international crime". The Preamble to the League of Nations Protocol for the pacific

20 He was a British Practising Barrister, Specialising in International Law.

21 For further details please see: *http://www.europaeum.org/files/publications/pamphlets/Ian Brownlie.pdf* accessed on 17/November/2013.

22 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1947.

Settlement of International Disputes(Geneva Protocol), of 1924, "recognizing the solidarity of the members of the International Community", stated that " a war of aggression constitutes a violation of this solidarity, and is an international crime", and that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the peaceful settlement of disputes between the States and of ensuring the repression of international crimes". The declaration concerning wars of aggression adopted on 24 September 1927 by the Assembly of the League of Nations declared, in its preamble, that war was an "international crime".[23]

An analysis of the Charter of the Nuremberg Tribunal portrays that it did not contain any definition of "war of aggression", nor was there any such definition or the analysis of this concept made in the judgment of the Tribunal. It was only by reviewing the historical events before and during the war that it found that certain of the defendants planned and waged aggressive wars against twelve nations and therefore guilty of a series of crimes. The Tribunal considered that the terms "planning" and "preparation" of a war of aggression included all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. But the judgment essentially stated that "planning and preparation are essential to the making of war".

To add to the above mentioned thought Justice Jackson's focus at Nuremberg was on the aggressive war count whereby individuals were charged with planning, preparing, and carrying out wars of aggression. In this respect, less progress has been made in implementing the inheritance of Nuremberg. No doubt that the judgment of the international military tribunal itself held that the Nazis committed acts which constituted aggression.

Robert Jackson, the architect of Nuremberg, felt that aggression was the most important crime dealt with at Nuremberg and aggressive war remains an essential item on our international agenda today.

Further Nuremberg held individuals responsible for planning, preparing, and carrying out wars of aggression. Nuremberg denied the Act of State as defense which would have justified such actions on grounds that they were within Nazi Germany's prerogative as a Sovereign State. Nuremberg said that the individuals on trial were obligated not to plan and carry out wars of aggression despite authorization by the German State.

Thus, Nuremberg held that individuals had obligations under international law which they could not ignore despite nation-state sanction of the actions in question. Moreover, Nuremberg held that, in the conduct of warfare, individuals had obligations under this higher law. It governed their behavior in the conduct of war and made them responsible for their actions.

---

[23] Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal with commentaries, 1950, *Yearbook of the International Law Commission*, Vol. II, p. 376.

7.1 Factual Background of IMT Tribunal

The trial of the Nazi criminals started on 20 November 1945 and lasted till 1 October1946 in the Palace of Justice at Nuremberg. The Nuremberg Tribunal considered it necessary to begin by reviewing the factual background of the aggressive war; it traced the rise of the Nazi party under Hitler's leadership to a position of supreme power, which paved the way for the alleged commission of all the crimes.[24] The Tribunal considered the origin and aims of the Nazi Party as well as its seizure and consolidation of the power. The Tribunal further noted that the Nazis sought to obtain power for the purpose of imposing a totalitarian regime that would enable them to pursue their aggressive policies.[25] They consolidated their power by reducing the power of local and regional governments;[26] securing control of the civil service; controlling the judiciary; persecuting and murdering their opponents including Jews, making Nazi Party the only legal political party and making it a crime to maintain or form any other political party; abolishing independent trade unions; and youth organizations; limiting the influence of churches; and increasing Nazi's power over the German population by controlling education and the media.[27]

The Nazis were held liable for waging aggressive wars even though the term aggressive wars was not defined. On the other hand the argument of the defense was that this collapse of the collective security system that came into existence after the First World War signaled a return to the *jus ad bellum*; the anarchical international system where the use of force as a foreign policy was quite acceptable. But the Tribunal contented that the defendants who were senior leaders of Nazi regime must have known that Germany's aggressive foreign policy was in violation of treaties like Kellogg- Briand Pact, which outlawed the use of force. The Tribunal furthermore used the analogy of criminal liability for war crimes to support its opinion that, read together with the particular history of the Kellogg- Briand Pact and other international instruments and draft instruments actually providing for the criminalization of aggression, there could be retrospective criminal liability of aggression.

1.8 The Judgement of IMT

The judgment of the Tribunal was delivered 30 September and 1 October 1946.The Nuremberg Tribunal made the following observations concerning the charges relating to the crime against peace:

---

24 Nuremberg Judgment, pp. 174-182.

25 The Nuremberg Tribunal observed as follows: " ..... the NSDAP leaders did not make any serious attempt to hide the facts that their only purpose in entering German political life was in order to destroy the democratic structure of the Weimar Republic, and to substitute for it a National Socialist totalitarian regime which would enable them to carry out their avowed policies without opposition." Nuremberg Judgment pp. 176-177.

26 The Tribunal stated as follows: "In order to place the complete control of the machinery of government in the hands of the Nazi leaders, a series of laws and decrees were passed which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Government of the Reich." Nuremberg Judgment p. 178.

27 The German Labour Party, which was formed on 5 January 1919, later changed its name to the National Sozialstische Deutsche Arbeiter Partei – NSDAP or Nazi Party.

"The charges in the Indictment that the defendants planned and waged aggressive wars are charges of utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only form other war crimes in that it contains within itself the accumulated evil of the whole."[28]

If we specifically talk about aggression it is an act which cannot be accepted and the Nuremberg though directly did not deal or define aggression but incorporated it under Crime against Peace and considered it as an offense. It has been considered as a crime from generations now. It is an offense so deep and heinous that we cannot endure its repetition and that's why Nuremberg was the first attempt to make individuals liable for aggression. The problem with the judgment of the IMT in its handling of the aggression charge and the conspiracy to commit aggression charge is that it does not contain significant generic language dealing with the concept of aggression. The IMT came down hard against aggression, saying it is "the supreme international crime," which included, in essence, all other war crimes; but the Tribunal limited its discussion to the factual situations involving particular individuals.[29] The tribunal provided no sweeping discussion on aggression, *per se*, or what other perquisites (e.g., rank) there are for convicting particular individuals on aggression. In other words, the IMT judgment left open the question of how involved in the policy of aggression an individual would have to be in order to be convicted. Specially, the Tribunal resolved whether an individual must have been on a policy level where he could have influenced policy but failed to do so. In essence, the IMT held its judgment that aggressive war was the ultimate international crime, but did not elucidate the scope of the aggressive- war- charge, or distinguish its application to lower- ranking government officials and non- government actors, from those tried at Nuremberg.

1.9 Conclusion

To understand what the world would have been like without Nuremberg let us look at the following probabilities. First, there would be no enforceable international human rights because they had not been articulated in any court with enforcement powers. Without Nuremberg, an enforceable international human rights legal system would have to be developed from scratch. The end of World War II was the now- or never opportunity to face the issues of genocide and crimes against humanity. Nuremberg marked, indeed, the birth of the concept that all individuals have certain inalienable human rights which transcend the boundaries of nation- States. This was a great step forward in human development and protection of human rights.

Nuremberg's potential has never been fully realized for enforcement purposes. Ideally Nuremberg served as a beacon light for the prevention of crimes, as well as for their punishment. Before this ideally there was no international body or organization that held liability for any wrongful act done by individuals. Its rules

---

28 Nuremberg Judgment, p. 186.

29 XXII Trial of the Major War Criminals before the International Military Tribunal 431(1948).

acted as a deterrent to those who committed international crimes (crimes against peace, war crimes, crimes against humanity and genocide). The real problem in having a specific definition on Crime of Aggression was that since the Nuremberg trials and the creation of the new UN- dominated collective security system, 'the quest for a definition of aggression' became a 'vast law- making project with many facets'. From being originally a military concept, it became much more of a legal concept after the First World War. While the IMT at Nuremberg (and certainly the subsequent proceedings) interpreted and applied aggression rather narrowly, the attempts to define aggression in the post- Second World War era drew a number of state policies that might have an impact on the interests of other states- thus making it the 'law-making project'. The concept of aggression was no longer limited to the use of armed force, but concepts like 'economic aggression' and 'indirect aggression' (states acting vicariously) were also entertained and played a role in the different drafting processes and debates on a suitable definition for aggression.

Nevertheless with the Judgment of Nuremberg we at last reach to the very core of international strife, and we set a penalty not merely for war crimes, but for the very act of war itself, except in self-defense.

Further it proved that we must penetrate the veil of national sovereignty and punish individuals for violations of international law if we are to give that law life and vitality. Nuremberg took us a long way on the path of avoiding human destruction by giving us an outline for establishing Rule of Law. But there is still much ground to be covered in building a secure world for all of us, particularly in the aggressive war area. We need to make urgent efforts to meet this challenge-not only for ourselves, but for future generations.

However, we cannot forget the fact that Nuremberg changed the outlook towards how the crimes are to be dealt with. Some of the final conclusions that may be offered if we make an analysis of Nuremberg are:

(1) Prior to Nuremberg the civilized world looked upon aggressive war as a crime, but one punishable by economic and political sanctions against the nation, not individual punishment of the nation's leaders.

(2) A country's leaders could not be punished under existing international law for crimes against their own people within their own country unless such crimes were associated with war crimes (the Tribunal apparently recognized this although the indictment might be interpreted otherwise).

(3) The leaders of those crimes could be punished as individuals for war crimes and crimes against humanity associated with their war crimes.

(4) Defense of superior order is no bar to punishment of an individual when the order is obviously unlawful on its face.

The most important accomplishment of the Nuremberg trials was the condemnation of illegal war making as the supreme international crime. The great step forward in the evolution of international humanitarian law must not be discarded or allowed to wither. Insisting that wars cannot be prevented is a self-defeating prophecy of doom

that repudiates the rule of law. Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason.[30]

The record of the Nuremberg trial thus becomes one of the foundation stones for the maintenance of peace and security. Nuremberg was a vision for a better future, but it was a bit ahead of its time. The world moves slowly when dealing with matters of extreme sensitivity, such as sovereignty. We should view Nuremberg today as it was viewed then - part of an evolving process which involves limitations on the pristine concept of national sovereignty. To summarize, Nuremberg has given us a blueprint for a better world in which men and women throughout can live in peace and security and with dignity.

30 Henry T. King. Jr, " Nuremberg and Crime against Peace", *Case Western Reserve Journal of International Law*, Volume 21 (2009), pp. 273-290 at p. 290

LAW COMMISSION OF INDIA ON WITNESS PROTECTION : A CRITIQUE OF VARIOUS REPORTS

Dr Sonika Bhardwaj*

1.1 Introduction

Law reform has been a continuing process particularly during the last 300 years or more in Indian history. In the ancient period, when religious and customary law occupied the field, reform process had been ad hoc and not institutionalized through duly constituted law reform agencies. However, since the third decade of the nineteenth century, Law Commissions were constituted by the Government from time to time and were empowered to recommend legislative reforms with a view to clarify, consolidate and codify particular branches of law where the Government felt the necessity for it.[1]

After independence, the Constitution of India with its Fundamental Rights and Directive Principles of State Policy gave a new direction to law reform geared to the needs of a democratic legal order in a plural society. Though the Constitution stipulated the continuation of pre-Constitution Laws (Article 372) till they are amended or repealed, there had been demands in Parliament and outside for establishing a Central Law Commission to recommend revision and updating of the inherited laws to serve the changing needs of the country. The Government of India reacted favourably and established the First Law Commission of Independent India in 1955 with the then Attorney-General of India, Mr. M. C. Setalvad, as its Chairman. Since then twenty Law Commissions have been appointed, each with a three-year term and with different terms of reference.[2]

The Reports of the Law Commission are considered by the Ministry of Law in consultation with the concerned administrative Ministries and are submitted to Parliament from time to time. They are cited in Courts, in academic and public discourses and are acted upon by concerned Government Departments depending on the Government's recommendations. The Law Commission of India has forwarded 243 Reports so far on different subjects.

For successful investigation and prosecution of crime, it is of utmost importance that witnesses have trust in criminal justice system. They need to have the confidence to come forward to assist in enforcement of law so that offenders don't go scot free. They need to be guarded from the unholy combination of money and muscle power, intimidation and monetary inducement. They need to be assured that the law

---

* Assistant Professor, Department of Law , Panjab University, Chandigarh

1 The first such Commission was established in 1834 under the Charter Act of 1833 under the Chairmanship of Lord Macaulay which recommended codification of the Penal Code, the Criminal Procedure Code and a few other matters. Thereafter, the second, third and fourth Law Commissions were constituted in 1853, 1861 and 1879 respectively which contributed a great deal to enrich the Indian Statute Book with a large variety of legislations.

2 The twentieth Law Commission was constituted through a Government order with effect from 01 September, 2012. It will have a three-year term ending 31 August, 2015.

enforcement agencies would provide them the requisite support and protection from intimidation as well as shield them from the harm that criminals may seek to inflict upon them in attempts to discourage or punish them from cooperating. The issue of witness protection has been considered by Law Commission in some of its reports. In this article the discussion has been limited to only such reports.

2.1 The Fourteenth Report of LCI

In the Fourtenth Report,[3] a reference was made to inadequate arrangements for witnesses in the Court house, the scales of travelling allowance and daily bhatta (allowance) paid to witnesses for attending the Court in response to summons. The Commission recommended[4] revision of rate for payment of travelling allowance and daily bhatta to the witnesses and for government to make adequate budgetary provisions for the same. It also recommended that provisions should be made for the witnesses attending the Court. Thus it was in a very limited sense that 'witness protection' was considered in its report by the Law Commission or to be more precise, the recommendations were meant to reduce the inconvenience (economical as well as personal) caused to the witnesses when they visited the courts. While this may seemingly be a minor issue, it assumes significance given the fact that lack of any respect for the dignity of witnesses persuades them to adopt a couldn't-careless attitude over a period of time, leading to a denial of justice to the victims of crime. However this aspect does not need any elaboration that the issue of witness facing some kind of threat or some harm coming from the accused; or such fear in the mind of the witness was never a subject matter of consideration in this report.

3.1 One Hundred and Fifty Fourth Report of LCI

In its one hundred and fifty fourth Report,[5] the Law Commission noticed the views expressed in its 14th Report, as also the views of the National Police Commission.[6] The Law Commission admitted that there was "plenty of justification for the reluctance of witnesses to come forward to attend Courts promptly in obedience to the summons". The plight of witnesses appearing on behalf of the State was found to

---

3 *Fourteenth Report* of Law Commission of India on *Reform of Judicial Administration*, Volume II (1958) Chapter 36; The First Law Commission.

4 *Id.,* at p. 788.

5 *One Hundred and Fifty Fourth Report* of Law Commission of India on *The Criminal Procedure Code* 1973, Chapter X - Protection and Facilities to Witness (1996); The Fourteenth Law Commission.

6 Witness protection, in its narrow interpretation, and its impact on judicial administration, was also dealt with in the 4th Report of the National Police Commission June 1980, Chapter 28. The Police Commission referred to the inconvenience and harassment caused to the witnesses in attending courts. Another aspect adverted by the Police Commission was the payment of daily allowances due to the witnesses for appearance in courts. The Commission noted that the monetary compensation was woefully inadequate and referred that out of 96,815 witnesses who attended the courts during the test period, only 6697 witnesses were paid some allowance, and that too after following a rather cumbersome procedure (which incidentally has hardly changed for the better anywhere). These figures signify the irrelevance of the amount paid to witnesses for their troubles. Apart from this point made by the Commission, these figures suggest the backbreaking burden on the magistracy, in as much as each magistrate was expected to examine, on an average, about 5400 witnesses.

be pitiable not only because of a lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly hardened criminals, which results in their life being at great peril. The Commission suggested two alternative procedures for dealing with these problems:

(i) The first recommendation was for the recording of statements during investigation in all cases before a Magistrate and for this purpose a new Section 164A in Cr.P.C., 1973 was suggested.

(ii) The second alternative procedure suggested was namely, that witness's signature or thumb impression on the statements should be obtained and that these statements must be sent to the Magistrate forthwith rather than at the time of filing the charge sheet.

As regards first alternative, the recording of statements during investigation in all cases before a Magistrate was not practical since there weren't so many Magistrates. The Commission itself had also felt that this alternative might not be immediately feasible due to the said reason. Regarding second alternative this was widely felt that the same could be misused by the police authorities and so the same has also not been accepted by any government. Further the Law Commission recommended:

(i) Realistic allowances should be paid to witnesses for their attendance in courts, and the procedure should be simplified.

(ii) Adequate facilities should be provided to witnesses for their stay in Court. Witnesses must be given due respect and efforts should be made to remove all reasonable causes for their anguish.

(iii) Witnesses should be protected from the wrath of the accused in any eventuality.

(iv) Witnesses should be examined on the day that they are summoned and the examination should proceed on a day-to-day basis.

Thus in this report the Law Commission moved a step ahead in the direction of realizing the fact that it was not only the lack of proper facilities and conveniences that was a hindrance in witnesses coming forward to testify but another important issue was that witnesses have to incur the wrath of the accused, which results in their life being at great peril. However the alternatives suggested by the Commission were not only either impractical or widely unacceptable but they would have been of no help to the witness even if implemented, as far as the issue of these witnesses putting their (or that of their near and dear ones) life or property in danger was concerned. Here again the suggestions were meant more to prevent the witnesses from backtracking from their earlier statements or at the maximum to reduce inconvenience caused by the lack of facilities and to overcome financial constraints. However one aspect cannot be ignored and that is that this report of the Law Commission particularly noted: "*Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality*", although "How to do it" is not coming forth from it.

4.1 One Hundred and Seventy Second Report of LCI

The One Hunded and Seventy Second Report[7] of the Law Commission in 2000 dealing with the review of rape laws suggested that the testimony of a minor in the case of child sexual abuse should be recorded at the earliest possible opportunity in the presence of a Judge and a child support person. It further urged that the Court should permit the use of video-taped interview of the child or allow the child to testify by a closed circuit television and that the cross examination of the minor should be carried out by the Judge based on written questions submitted by the defence. The Commission also recommended insertion of a proviso to Section 273 of Cr.P.C., 1973 to the effect that it should be open to the prosecution to request the Court to provide a screen so that the child victim does not see the accused during the trial. Thus in this report the Commission only dealt with a specific nature of crime and recommended some methods to prevent the trauma which a victim was likely to face if he/she was made to testify in the presence of the accused. So this report will only be of limited help on the vast issue of designing various strategies required for the protection of witnesses in the criminal justice system at different stages of trial or thereafter.

5.1 One Hundred ans Seventy Eighth Report of LCI

In December, 2001, the Sixteenth Commission gave its One Hundred ans Seventy Eighth Report[8] for amending various statues, civil and criminal. This report dealt with problem of hostile witness and the need to ensure a fair investigation. In the report it was observed that experience showed that where the accused happened to be a rich and/or influential person or member of mafia gangs, the witnesses very often turned hostile either because of the inducements offered to them or because of the threats given to them or may be on account of promises that may be made to them. So it was felt that to protect public interest and to safeguard the interests of society, measures needed to be devised to eliminate, as far as possible, scope for such happenings. The Report also dealt with the issue of precautions, the police should take at the stage of investigation, to prevent fabrication by witnesses when they are examined later at the trial. While referring to the two alternatives suggested by the Fourteenth Report Law Commission,[9] the Commission suggested a third alternative i.e. in all serious offences, punishable with 10 or more years of imprisonment, the statement of important witnesses should be recorded, at the earliest, by a Magistrate under Section 164 of Cr.P.C.,1973. For less serious offences, Commission observed, the second alternative (with some modifications) would be viable.

---

7 *One Hundred and Seventy Second Report* of Law Commission of India, March 2000, (the Fifteenth Law Commission). In *Sakshi v. Union of India* (2004 Cri.L.J.2881.) the Supreme Court referred to the *One Hundred and Seventy Second Report* of the Law Commission and laid down that certain procedural safeguards those had to be followed to protect the victim of child sexual abuse during the conduct of the trial.

8 *One Hundred and Seventy Eighth Report* of Law Commission of India on *Recommendations for Amending Various Enactments, Both Civil and Criminal*, December 2001.

9 *Supra* note 5.

The Law Commission favorably considered these two alternatives and recommended the insertion of Section 164A in Cr.P.C., 1973.[10] As regards second alternative suggested by the 14th Law Commission,[11] the Commission suggested amendment in Sections 162, 173(5) and 174 of Cr.P.C., 1973.

However none of the above referred reports of the Law Commission suggests any measures for the physical protection of witnesses or even suggest how witnesses could be protected from the "wrath of the accused". Further these do not deal with the question whether the identity of witnesses can be kept secret and if so, in what manner the Court could keep the identity secret and yet comply with the requirements of enabling the accused or his counsel to effectively cross examine the witness so that the fairness of the judicial procedure is not sacrificed.[12]

Thus, the above analysis of the various recommendations of the Law Commission made from time to time, including the one hundred ans seventy eighth report shows that they do not address the issues of 'protection' and 'anonymity' of witnesses or the procedure that has to be followed for balancing the rights of the witness on the one hand and the rights of the accused to a fair trial.[13]

5.1 One Hundred and Ninty Eighth Report[14] of LCI

On account of the observations of the Supreme Court in certain important cases and the importance of the subject of witness protection in India the Law Commission under the chairmanship of former Supreme Court judge M Jagannadha Rao, suo-motto took up the subject of 'Witness Anonymity' and 'Witness Protection'. The

---

10 The amendment suggested by the Law Commission reads as follows:

a) "164A (1) Any Police Officer making an investigation into any offence punishable with imprisonment for a period of ten years or more (with or without fine) including an offence which is punishable with death, shall in the course of such investigation, forward all persons whose evidence is essential for the just decision of the case, to the nearest Magistrate for recording their statement.

(2) The Magistrate shall record the statements of such persons forwarded to him under sub-section (1) on oath and shall keep such statements with him awaiting further police report under Section 173.

(3) Copies of such statements shall be furnished to the investigating officer.

(4) If the Magistrate recording the statement is not empowered to take cognizance of such offence, he shall send the statements so recorded to the magistrate empowered to take cognizance of the case.

(5) The statement of any person duly recorded as a witness under sub-section (1) may, if such witness is produced and examined, in the discretion of the Court and subject to the provisions of the Indian Evidence Act, 1872, be treated as evidence."

b) S.311A: The statement of the witness duly recorded under sub-section (1) of Section 164 of this code may, in the discretion of the presiding judge , if such witness is produced and examined , be treated as evidence in the case for all purposes subject to the provisions of the Indian evidence act 1872

11 *Ibid.*

12 Law Commission of India, *Consultation paper on Witness Identity Protection and Witness Protection Programmes*, August 2004, para 4.6 , p. 37.

13 *Id.*, para 4.8, p. 37.

14 *One Hundred and Ninety Eighth Report* of Law Commission of India on *Witness Identity Protection and Witness Protection Programmes*, August, 2006.

Commission first brought out a consultation paper highlighting the ''urgent need'' to give witnesses the option, firstly, of deposing anonymously and secondly, of being rehabilitated elsewhere through, what is provided in several advanced countries, a ''Witness Protection Programme.''

The Law Commission's consultation paper on Witness Identity Protection (hereinafter WIP) and Witness Protection Programme (hereinafter WPP) August 2004 broadly categorized the need of witness protection as follows:

(i) The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a Court. This phenomenon of witnesses turning 'hostile' on account of the failure to 'protect' their evidence is one aspect of the problem. This in turn would entail special procedures to be introduced into the criminal law to balance the need for anonymity of witnesses on the one hand and the rights of the accused, on the other, for an open public trial with a right to cross-examination of the witnesses, after knowing all details about witnesses.

(ii) The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects which call for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case, by the introduction of WPPs.

As per the Commission, while the first aspect of protecting the evidence of witnesses from the danger of their turning 'hostile' has received limited attention at the hands of Parliament in some special statutes dealing with terrorism, there is an urgent need to have a comprehensive legislative scheme dealing with the second aspect of physical protection of the witness as well. Further, both aspects of anonymity and witness protection will have to be ensured in all criminal cases involving grave crimes not limited to terrorist crimes. So in the view of the Commission, the implementation of such a law would involve drawing up.

(i) Procedures for granting anonymity to witnesses and also

(ii) Introducing WPPs as well in which personal protection is granted to the witness; sometimes by shifting the witness to a different place or even a different country; or by providing some money for maintenance or even by providing employment elsewhere.

The Commission referred in detail the observations of the Supreme Court regarding need for a law on various aspects of witness protection, in the judgments in *NHRC v. State of Gujarat*[15] and in *Zahira Habibulla H. Sheikh v. State of Gujarat* .[16]

While drawing attention to various provisions in different statutes in India, the Commission however pointed out that those provisions of Cr.P.C., 1973 and IPC,1860 are not sufficient. It has also discussed various special statutes in India, which had certain provisions related to protection of identity of the witness. In

[15] 2003(9) SCALE 329.
[16] 2004 Cri.L.J. 2050.

opinion of the Commission, apart from these provisions in special statutes, there is a need for a general law dealing with witness anonymity in all criminal cases where there is danger to the life of the witness or of his relatives or to his property.

Law Commission discussed various principles of law developed by the Supreme Court and the High Courts for Protection of Identity of Witnesses v. Rights of Accused. These principles basically stress upon the need for a congenial atmosphere for the conduct of a fair trial and this included the protection of witnesses.

In relation to the provisions for identity protection of witnesses in some special statutes, cases *like Kartar Singh v. State of Punjab,*[17] *People's Union of Civil Liberties v. Union of India*[18] were discussed where the Supreme Court upheld the validity of provisions which gave the discretion to the Designated Court to keep the identity and address of a witness secret upon certain contingencies; to hold the proceedings at a place to be decided by the Court and to withhold the names and addresses of witnesses in its orders. The Court held that the right of the accused to cross-examine the prosecution witnesses was not absolute but was subject to exceptions.

The *Best Bakery Case,*[19] in the context of the collapse of the trial on account of witnesses turning hostile as a result of intimidation, where the Supreme Court reiterated that "legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day", was also discussed.

This was brought out in the consultation paper that the judgment of the full bench of the Punjab and Haryana High Court in *Bimal Kaur Khalsa* v. *State of Punjab,*[20] which provided for protection of the witness from the media, did not deal with all the aspects of the problem. In that case, it was observed that neither the Court nor the government could ensure the 'total safety' of a prosecution witness. However one important aspect appeared to have escaped the notice of Commission and that was the sluggish attitude of courts. The Commission didn't mention about the same except commenting that this judgment does not deal with all the aspects relating to witness protection. Law Commission has very well tried to study the guidelines issued by the Delhi High Court in *Neelam Katara v. Union of India* [21] murder case adding that although, the guidelines for witness protection laid down by the Delhi High Court in this case require to be commended, they do not deal with the manner in which the identity of the witness can be kept confidential either before or during the trial. Further the guidelines of Delhi High Court regarding witness protection in this murder case are applicable only on the witnesses who were to depose in cases punishable with death sentence or life imprisonment. With due regards to the same, however, nothing has been mentioned in reference to those witnesses who have to

17 1994 Cri.L.J. 3139.
18 AIR 2004 SC 456.
19 *Supra* note 16
20 AIR 1988 P&H 95.
21 Crl.W.No. 247 of 2002, decided on 14.10. 2003 by Justice Usha Mehra and Justice Pradeep Nandrajog.

give evidence in less serious offences. However one thing is sure that these judgments highlight the need for a comprehensive legislation on witness protection.

A very detailed comparative study of case law and other countries in relation to witness anonymity and balancing of rights of accused was done to analyse the issue. The Commission also referred to the WPPs in various countries.

Finally, the Commission came forward with a Questionnaire in two parts A and B, the first relating to WIP and the second dealing with WPPs and circulated the same with a view to obtain the views of Governments, Police authorities, Judiciary, Bar, NGOs etc. The Commission also held two Seminars on the issue. After taking into consideration the responses to the Consultation Paper, as above, the seventeenth Law Commission[22] submitted its One Hundred and Ninty Eight Report.

The Commission observed in the report that the Supreme Court of India had referred to the question of WIP and WPP in a number of judgments viz *NHRC* v. *State of Gujarat,*[23] *PUCL* v.*UOI,*[24] *Zahira* v. *State of Gujarat,*[25] *Sakshi* v.*UOI,*[26] *and Zahira* v. *Gujarat.*[27] In *Sakshi,*[28] the Commission observed that the Court emphasized the need of legislation on witness protection.

In this Report the Commission has confined the WIP procedures to cases triable by the Court of Session or courts of equal rank.

The Report says that the WIP may be required during investigation, inquiry and trial, while WPP apply to the physical protection of witness outside the Court. It observed that WIP is necessary in the case of all serious offences where in there is danger to witnesses and it is not confined to cases of terrorism or sexual offences.

The Commission has discussed all the responses to the questionnaires and then given its recommendations, both in regard to WIP and WPP. So far as the WIP is concerned, it has given a Draft Bill but the Commission has not given any Draft Bill in regard to WPP.

In this Report the Commission summarised at various places, what had been stated in the Consultation Paper and dealt with certain crucial principles of criminal jurisprudence and procedural details where WIP is claimed or granted.[29] In part I of this report i.e. WIP; the Commission discusses the rights of the accused i.e. the accused has a right to an open public trial in a criminal Court and also a right to examination of witnesses in open Court in their presence. But, these rights of the accused are not absolute and may be restricted to a reasonable extent in the interests of fair administration of justice and for ensuring that victims and witnesses depose

---

22 Headed by its Chairman, Justice M. Jagannadha Rao, submitted to the Union Law Minister, Mr. H.R. Bhardwaj, August, 2006.

23 *Supra* note 15.

24 *Supra* note 18.

25 *Supra* note 16.

26 2004 Cri.L.J. 2881.

27 2006 Cri.L.J. 1694.

28 *Supra* note 26.

29 Part I of this Report (Chapters II to X) deals with WIP and Part II (Chapters XI to XIII) with WPPs.

without any fear. The law has to balance that right of the accused as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.

In the Report the witnesses have been categorized as:

(i) Victim-witnesses who are known to the accused;

(ii) Victim witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused)

(iii) Eitnesses whose identity is not known to the accused.

Category (i) i.e. victim-witnesses who are known to the accused requires protection from trauma. As the victim is known to the accused, there is no need to protect the identity of the victim but still the victim may desire that his or her examination in the Court may be allowed to be given separately and not in the immediate presence of the accused. In this case victim-witness, should be protected from any trauma, which can be caused if he/she were to depose while physically facing the accused.

The Committee observed that in *Sakshi case*[30] it was held that a screen can be erected to preclude the victim from seeing the accused. But, Commission gave its opinion, psychologically a victim is not free if the accused is in the same room and they are merely separated by a screen. The Committee proposed a two-way television or video link coupled with a two-way audio system connecting two rooms and also proposed a two-way closed-circuit television with a video screen in each of two different rooms. The victim-witness will be present in a room and in that room, the Prosecutor, the defence lawyer and the technical personnel who operate the close-circuit television will also be present. The Judge and the accused, the technical personnel, the Court master and stenographer, will be in the Courtroom. There will be a video screen in the Courtroom so that the Judge and the accused can watch the victim-witness, the Prosecutor and the defence lawyer examining the victim-witness. In the other room where the victim and the two lawyers are present, there can be another screen which will be used only at the initial stage when the victim has to identify the accused. After that is done, that video camera in the room where the accused is stationed will not be focussed on the accused. While the victim deposes thereafter in chief or cross-examination, he will not be seeing the accused in the screen in his room any longer. The defence lawyer sees the victim directly in his room and can examine his or her demeanour. The Judge and the accused can see the victim on the screen in their room and watch his or her demeanour. The Court master and the stenographer can also be in the room where the Judge is sitting. There will be a video screen in the Courtroom so that the Judge and the accused can watch the victim-witness, the Prosecutor and the defence lawyer examine the victim-witness.

Category (ii) and (iii) i.e. victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and witnesses whose identity is not known to the accused require protection against disclosure of identity. The Committee proposed that where victim/witness has been granted identity protection

30 *Supra* note 26

earlier and he is giving evidence at the trial, it is essential that the accused as well as the counsel for accused must be precluded from identifying the victim/witness concerned. But, here too, in the case of both victim-witness and the witness who are not known to the accused, they may have to first identify the accused as the person guilty of the crime. Therefore, there must be a two-way closed circuit television with screens in the room where such victim-witnesses are present and give evidence. Both the accused and defence lawyer must be in a separate room, in as much as both of them should not see the victim-witness or witness concerned, who will be in another room. If such victim-witness or witnesses seeking protection is in another room and the public prosecutor also is in that room, there can be allegations of the victim/witness for prosecution being prompted invisibly by the Prosecutor. Therefore, it is advisable that the Judge also must be in that room wherefrom the victim-witness or witness deposes. Thus, the arrangement must be that the victim/witness who seeks protection of identity, the public prosecutor and the Judge, his Court master and stenographer and the technical personnel will be in the Courtroom while the accused and the defence lawyer will be in another room. There will be a video-screen in each room. The camera in the room of the victim/witness, Prosecutor and Judge will not be focussed on the victim/witness whose identity is to be kept confidential. It will be focussed on the Judge and the Prosecutor who are in the Courtroom. The Judge and the Prosecutor over whom the camera is focussed will be seen on the screen which is kept in the room of the accused and the defence lawyer. There will have to be a two-way audio system also connecting both rooms. The Court master, the stenographer and the technical personnel must take an oath that they will not disclose the identity of the witness-victim (who has earlier obtained protection order) who is giving evidence at the trial. Breach of the oath can be visited by proceedings for contempt of Court, in accordance with law.

After this the Committee proposed that there should be balance between the rights of the accused and need for WIP. For this purpose, in the Consultation Paper as well as in this Report, the Commission has extensively referred to the comparative law as to how these rights are balanced in other countries.

The next important question which was considered is as to the stage at which the WIP is to be granted .The Commission has divided the case in four stages

(i) Investigation;

(ii) Inquiry;

(iii) Trial; and

(iv) Post trial.

(i) At the Stage of Investigation

This is the first stage. The Commission is of the view that WIP is necessary even at the stage of investigation. There are certain stages of the investigation at which point the witness identity may get revealed to the accused and it is there that WIP is necessary e.g. at the stage of recording statements under Section 161 or Section 164 or at the stage of filing of the charge-sheet under Section 173 into the Magistrate's

Court. At these stages of investigation, protection of identity may become necessary in some cases. The copies of the charge sheet, FIR, Section 161 and 164 statements of the persons and other documents, as stated above, have to be given to the accused under Section 207 except where the Police under Section 173(6) may request that those portions of the statements which disclose the identity of the witnesses be not granted. There may be a large number of cases where the Police Officer has not made a request under Section 173(6).

The Commission purposed to grant protection to witnesses in the cases of serious offences, namely, offences triable by the Sessions Court, it is obvious that even at the above stages of investigation adequate safeguards as to the nondisclosure of identity of the witnesses has to be considered and granted by the Magistrate. The Commission devised a procedure and proposed to confer statutory power on these courts.[31]

(ii) Inquiry/Preliminary Inquiry During Inquiry as Provided in Chapter 14 to Chapter 16 before the Magistrate:

This is the second stage. The Commission is of the view that WIP is necessary at the stage of inquiry also. Law Commission referred to some Sections viz 207 and 208 of the Cr.P.C., 1973.The Law Commission proposed that the accused may be heard separately and not in the presence of the victim or witness who are not known to the accused. Since during the course of investigation, when the Police applies through the public prosecutor before the Magistrate for a preliminary order granting anonymity, the accused is not given a hearing (as proposed above), the Commission said that it is necessary that at the stage of inquiry, there should be a fresh preliminary hearing, even in respect of the same witness, for the purpose of granting anonymity at the stage the witness gives evidence at the regular trial. This is because, in the preliminary inquiry now conducted (i.e. the preliminary inquiry after investigation), the accused will have to be heard on the question of granting anonymity to the witness. Whenever such an application is made after commencement of inquiry, the Magistrate has to conduct a preliminary inquiry as to whether the witness's life or property or that of his relatives is in danger. However an in camera hearing is necessary. Where during Inquiry, the Magistrate grants an

---

31 Procedure for 'Preliminary inquiry' for granting anonymity during Investigation:

(i) Where a Police Officer, before recording statements of witnesses under Section 161 of the Cr.P.C., 1973, feels that witness identity has to be protected, he must have the liberty to apply before the Magistrate concerned seeking permission to record the statement under a pseudonym subject to making the identity known only to the Magistrate.

(ii) However, where the identity is not kept confidential at the stage of recording the statement of witnesses as stated in (i) above but where the prosecution feels later during investigation, that it has to be kept confidential when copies of charge sheet and Section 161 of the Cr.P.C., 1973 statements etc. will be granted under Section 207 of the Cr.P.C., 1973, the police must be at liberty to apply to the Magistrate for such protection before the Magistrate takes cognizance of the offence.

(iii) There should be a preliminary inquiry, in camera, and at the stage of investigation, there is no need to hear the accused or giving him an opportunity.

anonymity order, it will ensure for the subsequent stages including trial and thereafter.

(iii) Trial/Preliminary inquiry before the Sessions Judge before Commencement of Recording Statement of Witnesses in Sessions Court

This is the Third stage. The Commission is of the view that WIP is necessary at the stage of trial also. In respect of other witnesses whose identity protection has not been sought during investigation or inquiry but where it is still considered necessary and in the case of fresh witnesses to be examined at the trial, there must again be an opportunity to the prosecution to apply for maintaining anonymity during the trial and, if need be, thereafter. As per the Commission such power should be conferred on the Sessions Court. There are today not many cases coming before the Sessions Court in which the trial is completed in respect of all witnesses or even of a single prosecution witness in a single day. Hence, the protection granted by the Magistrate or by the Sessions Court must last till the completion of the trial in the Sessions Court and cannot be confined to a stage just before the trial.

(iv) Post trial / Procedure for Recording Statement of such Witnesses at the Regular trial in Sessions Court and beyond:

(a) So far as the identity protection at the trial is concerned, if indeed the witnesses have been given a pseudonym during the investigation or inquiry or before commencement of trial, in the opinion of the Commission there can be no difficulty in allowing the further proceedings at the trial to be held on the basis of the same pseudonym.

(b) After the trial, in appeals and even after the conviction or acquittal the said pseudonym will continue. The Committee observed that if the disclosure of the identity of the witnesses after trial is not going to be of any advantage to the accused then, in the further proceedings like appeal etc., or after the conviction has become final, or even if he is acquitted, the anonymity may still be continued. If that is done, the life and property of the witness or relatives can remain out of any danger during the further proceedings also.

(c) So far as victims who are known to the accused and who have not sought anonymity and victims who have been refused a protection order, but whose trauma has to be taken care of, the evidence at the trial will be by use of a two-way close-circuit television or video-link and two-way audio system so that the victim need not depose in the immediate presence of the accused for otherwise he may face trauma.

The report talks about various countries which are governed by democratic constitutions and rule of law, stating that the position today is that the right to an open 'public trial' in the immediate presence of the accused is fundamental but is not treated as absolute.

The Commission also referred to the One Hundred ans Seventy Second Report of the Law Commission (2002), which accepts 'screening' procedure, in detail in the

Consultation Paper of 2004.[32] After the One Hundred and Seventy Second Report was presented to the Supreme Court, it passed judgment in *Sakshi v. Union of India*[33] and accepted 'video conferencing' and 'written questions' in sexual and other trials in the absence of a statute. The Court accepted three of the suggestions made by Sakshi[34] before the Law Commission, namely,

(i) Video-conferencing procedure, and

(ii) Putting written questions to the witnesses.

(iii) Sufficient break to be given while recording evidence

These were in addition to the 'screening' method suggested by the Law Commission in its Report. By the date the Supreme Court decided Sakshi,[35] on 26.5.2004, the Court had in another case, the *State of Maharashtra v. Dr. Praful B. Desai*[36](which concerned allegations as to medical negligence), permitted the evidence of a foreign medical expert to be received by videoconferencing. In that case, the Supreme Court followed *Maryland v. Craig.*[37]

So in its Report the Commission has relied on the case of *Sakshi,*[38] where the Supreme Court, while following *Praful B. Desai case,*[39] accepted that such evidence by video conference must be treated to be in compliance with requirements of Section 273 of Cr.P.C., 1973 which states that all evidence in the course of the trial or other proceedings shall be taken "in the presence of the accused" and it does not mean that the accused should have full view of the witness.

Thus in Sakshi that video-conferencing and putting written questions, were accepted by the Supreme Court in addition to screening suggested by the Law Commission. It held that these procedures do not offend the provisions of Section 273 of Cr.P.C., 1973 which requires a trial in the presence of the accused.

---

32 The subject of review of rape laws (172nd Report, 2000) was undertaken by the Law Commission in pursuance of a reference by the Supreme Court in *Sakshi v. Union of India* It referred to Section 273 of Cr.P.C.,1973 which states 'except as otherwise expressly provided, all evidence taken in the course of a trial or other proceeding, shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader' and the Commission agreed for a screen to be put in between the victim and the accused. It suggested insertion of a proviso to Section 273 as follows:

> "provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross examination of the accused."

33 *Supra* note 26

34 An organisation to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particular those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation and is a violence intervention center.

35 *Supra* note 26.

36 2003 Cri.L.J. 2033.

37 (1990) 497 US 836 decided by the US Supreme Court.

38 *Supra* note 26.

39 *Supra* note 36.

The Committee also talks about inherent powers of the Court. Under Section 482 of Cr.P.C., 1973, it is declared that, nothing in the Code, shall be deemed to limit or affect the inherent powers of the High Court. This is an obvious declaration that in criminal matters, the High Court has inherent jurisdiction. But, curiously, the Committee observed, the position of the other criminal courts like the Magistrate's Courts and the Courts of Session is different. The absence of such a provision in the Code saving the inherent power in so far as Sessions Courts and Magistrates' Courts are concerned, has led the Supreme Court to conclude that these subordinate Courts do not have inherent powers. This position was made clear by the Supreme Court in *Bindeswari Prasad Singh v. Kali Singh.*[40] Therefore, whatever be the position in other countries, criminal Courts at the trial stage, the Magistrates' Courts and Sessions Courts in our country cannot pass orders as to 'anonymity' of witnesses under inherent powers. So in the opinion of the Commission, while it is true that Courts whose inherent powers are accepted or recognized can pass witness anonymity orders under those inherent powers, legislation is necessary to confer powers on the Courts of Sessions and Courts of Magistrates to pass 'anonymity' orders.

In its report the Law Commission proposed witness anonymity only in relation to offences triable by Courts of Session. It discussed various replies received by it as a result of the questionnaire published with the Consultation Paper and then gave following recommendations:[41]

(i) So far as the stage of "investigation" is concerned, a provision is necessary to deal with witness anonymity at that stage.[42] So it is necessary to have provision to enable the Police to move the concerned Magistrate through the public prosecutor, seeking anonymity in respect of the witness concerned. Witnesses will, if the Magistrate grants an identity protection order, be described by a pseudonym or by a letter in the English alphabet, though the real identity will be disclosed to the Magistrate.

(ii) There must be provisions permitting anonymity to witnesses at the stage of inquiry. Witnesses will be described by letters from English alphabets. If an order of anonymity is granted, it will continue during inquiry and extend to the trial upto conviction or acquittal and beyond.

(iii) There must be WIP just before the stage of the Sessions trial i.e. before recording evidence of witnesses at the trial, so that protection is available to witnesses in respect of whom no orders were sought or passed during the earlier stages of investigation or inquiry. The witnesses will again have to be described by pseudonym or English alphabets. We are of the view that, at the

40 AIR 1977 SC 2432.

41 *Supra* note 14, Chapter X, p. 132.

42 The committee observed that It may be that the Police may consider that witness anonymity is necessary in certain cases during investigation. Therefore, whether it is at the stage of recording of statements under Section 161 of Cr.P.C., 1973 or Section 164 of Cr.P.C., 1973 or forwarding copies given under Section 164(6) of Cr.P.C., 1973, or when charge sheet and documents are filed under Section 173 of Cr.P.C., 1973 and copies thereof are supplied under Sections 207 and 208 of Cr.P.C., 1973, it is necessary to have provision to enable the Police to seek anonymity in respect of the witness concerned.

trial and after the trial, in the judgment of the Sessions Court, the anonymity must be reflected and continued.

(iv) After the judgment in the Sessions Court too, the anonymity must be continued in all appellate proceedings. Even in and after the judgment of the High Court or Supreme Court, as the case may be, the pseudonym or alphabet alone has to be mentioned. Even in the law reports or newspaper publications, the pseudonym or alphabet alone must be used. Thus witness anonymity must be maintained at all the stages, investigation, inquiry, trial and even at the appeal and thereafter also.

(v) Anonymity, for the present be confined to criminal cases only and to prosecution witnesses, where it is more needed.

(vi) In all cases triable by Courts of Session and Courts of equal designation or Special Courts, wherever there is proof of danger to the life or property of the witness or of his or her relatives, witness protection must be available.[43]

(vii) The WIP is a must in all cases triable by Sessions Court where there is danger to the witnesses, to his properties or to his close relatives. So far other cases are concerned, after the experience in cases triable by Sessions Courts, the Government may consider extending the procedure to other cases as well by appropriate statutory provisions.

(viii) In addition to the existing provisions concerning victims of sexual offences including children, the procedure of using "two-way closed-circuit television or video-link" and 'two-way audio link' must also be introduced. These provisions should apply to victims and also witnesses who seek identity protection. It must also apply to victims who have not applied for identity protection but have requested that they may be permitted to depose not in the immediate presence of the accused on the ground of trauma.

(ix) It will be necessary for the Court to require the passing of an order granting 'anonymity' to the witness in regard to whom the prosecution wants anonymity, whether at the stage of investigation, inquiry or trial.[44]

---

[43] The Commission observed that it is not necessary that witness protection be confined only to cases of terrorism and sexual offences. While the class of cases where anonymity will be given will be those triable by Courts of Sessions, it will be a matter for decision in each case, having regard to the nature of the offence and the facts of the case. Even in the case of an individual trial, it has to be extended only to prosecution witnesses in respect of whom there is adequate proof of danger to the life or property of the witnesses or of their close relatives. In other words, the case of each prosecution witness in respect of whom application is made, has to be separately taken up and decided. In fact, it is witness specific in all cases triable by Courts of Session.

[44] The Commission observed that the subjective satisfaction of the Commissioner of Police or of the senior Police Officer is not sufficient. It is a matter for a judicial order by a Court and not a matter for a police authority to pass an administrative order. Not only is the certificate not sufficient but it will lead to complex problems and it may also result in the Police Officer's certificate being challenged in parallel proceedings under Article 226 of the Constitution of India and this will delay the proceedings. So wherever anonymity is sought by the prosecution in respect of anonymity, the certificate by the Police Commissioner or other senior Police Officer is not sufficient. The matter requires an order of the Court by way of a judicial order. However, such certificate may be a piece of evidence which the Court shall have to consider while deciding whether to grant anonymity or not.

(x) There should be a preliminary inquiry before the Magistrate for purposes of deciding the issue whether anonymity is necessary. At the stage of investigation, an application can be moved by the Police that in respect of the particular witness anonymity is necessary while recording statements under Section 161 or Section 164 of Cr.P.C.,1973. A decision here will enure only for the period up to the filing of charge sheet.

(xi) Before the starting of the inquiry before the Magistrate, there should be an enabling provision for preliminary inquiry if anonymity is required for same witness or other witnesses for purposes of inquiry and trial and if granted, such orders will enure beyond the judgment of the Sessions Court and for purposes of appeal or revision and thereafter. There should also be a provision for grant of anonymity before the Court of Session before it actually starts recording evidence at the trial, if anonymity is necessary in respect of some fresh witnesses or in respect of witnesses for whom anonymity was not sought earlier or was refused. Here a preliminary order will have to be passed in respect of such witnesses by the Sessions Court before recording evidence relating to the trial. The anonymity granted by the Session Court must continue till trial is completed and thereafter also. At the stage of inquiry and trial, such application can be filed by the Prosecutor or even by the witness. At the stage of investigation, only the police can file such application. In all these preliminary inquiries, the identity of the witness will have to be kept secret and the prosecution must place the necessary material before the Magistrate or Sessions Judge as to why there should be an anonymity order. The Police may file the certificate of a senior Police Officer of the rank of Commissioner or District Superintendent of Police and in addition place other material before the Court.

(xii) In the preliminary inquiry during investigation, it is not necessary to hear the suspect. The Magistrate may personally question and examine the witness in his chambers in the presence of the Prosecutor. In the preliminary inquiry by the Magistrate during inquiry or by the Sessions Judge before recording evidence at the trial, they shall hear the defence lawyer or the accused separately on the question without divulging facts which may enable the defence lawyer or accused to know about the identity of the witness. It is necessary to give an opportunity to the defence lawyer/accused by hearing them separately in cases where anonymity is claimed for witnesses during inquiry and before recording evidence at the trial. The proceedings before the Magistrate/Sessions Court must be in camera. In the above preliminary inquiries by the Magistrate or Judge, there is no need to use the closed circuit television or video link methods. Such a procedure is required only for examination of protected witnesses or victims when they depose at the stage of trial in Sessions Court. Thus, there should be a preliminary inquiry by the Magistrate or Sessions Judge. In such preliminary inquiry, the identity of the witness has to be kept secret and the accused or his lawyer can be heard separately. The inquiry will be in camera. But at the stage of investigation, in any such preliminary inquiry, the accused need not be heard.

(xiii) It is neither necessary nor is it possible for the prosecution to prove that life or property of himself or his relatives "is" actually in danger. All that is possible for the prosecution is to prove that there is 'likelihood' of such danger, having regard to either previous attempts of the accused or his associates or having regard to the incidents with which the accused or his associates are notoriously involved etc.

(xiv) The Commission has proposed a definition of 'threatened witness' which includes victims who seek anonymity orders and 'likelihood' of danger to the life or property of the witness or of his close relatives. It also proposed a definition of 'close relatives'. There need be no proof of actual 'danger' to the life of the witness or his relatives or their property but proof of 'likelihood' is sufficient. The material or evidence placed for the purpose must be reliable.

(xv) The stage at which anonymity may be claimed during investigation is the stage when Section 161 or Section 164(6) of Cr.P.C., 1973 statements are recorded. Anonymity may also be claimed before copies of documents are issued to the accused under Sections 207, 208 of Cr.P.C., 1973. At the stage of investigation/inquiry, if the Magistrate comes to the conclusion that witness anonymity order has to be passed, he shall have to direct that in all documents which contain references to identity, including the Section 161 of Cr.P.C., 1973 statements or Section 164 of Cr.P.C., 1973 statements, the charge sheet of which a copy has to be given to the accused, the name and address and other information that may lead to the identification of the witness should not be reflected. When an application claiming anonymity is filed before the trial, similar provisions are necessary. As a consequence of the anonymity order, the identity and address should not be reflected in the document to be given to the accused and the original documents should be kept in safe custody. The above details should not be reflected in the Court proceedings also.

(xvi) There are two types of cases (1) where victim is known to the accused who does not want identity protection but only does not want to face the accused physically; and (2) where victim and witnesses are not known to the accused and want an identity protection order. Hence, separate procedures must be adopted in such cases. A two-way closed circuit television or video link along with two way audio link procedure should be used in the case of victim-witness known to the accused and to the cases of victims and witnesses not known to the accused. So far as the victim-witness known to the accused is concerned, who gives evidence from a different room through closed-circuit television is concerned, there is no need to exclude the public or media inasmuch there is no question of witness anonymity involved. The accused knows the victim. Of course in the case of sexual offences Section 327 of Cr.P.C., 1973 requires in camera hearing and in the case of juveniles, the statute requires in camera proceedings. Barring such cases where the victim is known to the accused, it is not necessary to exclude the public or the media.

(xvii) In the case of victims/witnesses not known to the accused, in as much as question of witness identity is involved, it is necessary to exclude the public

and media from both the witness-room as well as the Courtroom.[45] In case of victims not known to the accused, it is not necessary to exclude the public or the media.

(xviii) There is no need to allow a separate counsel or amicus curiae.

(xix) In the case of victim/witness not known to the accused, the camera will not be focussed on such persons and hence there is no need for distorting the image. So far as the voice is concerned, it may be distorted by an audio-device.

(xx) It is necessary that the identity should be kept confidential, throughout, and after judgment and in further proceedings. The confidentiality must be maintained even during the trial also and later.

(xxi) At the stage of preliminary inquiry during Investigation, accused need not be heard; and at the stage of preliminary Inquiry during inquiry and before recording evidence at the Trial, the accused is to be heard separately. In the latter type of situations, a list of questions can be given by or on behalf of the accused but not those which may lead to the identity of the witness.[46]

(xxii) It should be permissible to the same witness to apply again if he or she has either not applied earlier or such application has been refused.

(xxiii) The use of the two-way television or video link and audio systems is confined to the actual trial in the Courts of Session or equivalent Courts or Special Courts. But it may not be necessary to provide the systems for each Sessions Court. This aspect can be left to the High Court while making Rules as to the places where the infrastructure in this behalf may be provided.

(xxiv) During Investigation, the anonymity orders will be passed by Magistrates in a preliminary inquiry and this suits local convenience also. At the stage of Inquiry, it will be again be in a preliminary inquiry by Magistrates. But where application is filed before recording of evidence at the Trial, the application will be filed before the Sessions Court and will have to be decided before the recording of the regular evidence of the trial commences.

(xxv) So far as an order by the Magistrate at the stage of investigation is concerned, there need be no appeal by the prosecution or the witness if the application is refused by the Magistrate because an appeal can delay the investigation which is time bound. There is no question of the suspect filing any appeal against such an order.

In Part II of this Report, the Commission has given recommendations so far as "WPPs" are concerned. The Commission has not provided any draft Bill on this subject in as much as the question of funding is an important issue. The Commission has recommended that the Central and State Government must bear the expenditure

---

45 The Commission observed that such exclusion in the interests of administration of justice and preserving the privacy of witnesses and protecting them from danger to their life or property, will be valid and not hit by Article 14 or Article 19 (1) of the Constitution of India.

46 The Commission however observed that a two-way closed-circuit television with two-way audio facility rather than the procedure of listed questions should be preferred else the defence lawyer is confined to those questions and cannot put any further questions arising out of the answers of the witness.

equally, however no methodology for generation of funds or formula for contribution to the common fund by different State Governments has been given.

The Law Commission has considered the WPPs as referring to witness protection outside the Court. The Commission suggested that at the instance of the public prosecutor, the witness can be given a new identity by a Magistrate after conducting an ex parte inquiry in his chambers. In case of likelihood of danger of his life, he is given a different identity and may, if need be, even relocated in a different place along with his dependants till the trial of the case against the accused is completed. The expenses for maintenance of all the persons must be met by the State Legal Aid Authority through the District Legal Aid Authority. The witness has to sign an MoU which will list out the obligations of the State as well as the witness. The Commission has also dealt with complex situations where the witness has to prosecute or defend or be a witness in another civil or criminal case without disclosing his identity. The Committee summarised the basic features common to the WPPs in other countries.[47]

[47] The Commission summarised these as follows:

(i) There is a determination, initially, either by a Senior Police Officer or by a Court that a victim witness or other witnesses requires protection (i.e. protection outside Court);

(ii) The protection is generally granted in the case of witnesses who have to depose in trials relating to 'serious' crimes.

(iii) The protection is granted at the stage of investigation, and is continued thereafter till the trial is completed;

(iv) The State/Police in charge of protection programmes and the victim-witness or other witnesses have to enter into an MoU which specifies the mutual obligations of both sides;

(v) Among the types of protection, the most important are those relating to (a) giving the witness a 'new identity' and/or (b) relocation in a different place;

(vi) As a consequence of the MoU, the witness agrees to give evidence as required in the proceedings while the State has to bear the expenses of relocation, custody and maintenance of children, tax obligations of the victim-witnesses or other witnesses;

(vii) The witness may be granted accommodation in the Court or police premises subject to surveillance and security;

(viii) Protection may be extended in addition to physical protection of relatives;

(ix) There can be change in the physiognomy or the body of the protected person;

(x) No person is allowed to disclose the name of the witness admitted to the programme or of his identity in any manner whatsoever, nor draw any picture, illustration or painting or photograph, pamphlet, poster etc. of the witness;

(xi) (a) In respect of other civil proceedings to which a protected person is a party or in which he is a witness, if it appears to a Superior Court that if the protected person is to file or defend a civil case or be a witness therein, his safety is likely to be endangered when he initiates, defends or continues the civil proceedings, the Court may make an appropriate order with regard to allowing him to file the case, defend or continue it under his new identity or the Court may stay the proceedings. The purpose of the stay order is to prevent disclosure of the new identity or relocation of the said protected person. The Court may take steps to ensure on the one hand that the rights or obligations of the protected person are not unduly restricted while on the other hand, it may direct his identity or relocation be kept secret;

(b) If the protected person has to file a criminal case, he may do so under his new identity and such stay thereof. If he is an accused or a witness in a criminal case, after disclosing his real identity to the Court, the proceeding has to be stayed.

(xii) The identity and relocation will not be published in any Court proceedings or documents nor given publicity outside Court or in the media;

(xiii) Breach of MoU by the prosecution witness would enable the State to terminate the MoU.

In order to decide the procedure to be followed in our country in respect of WPPs the Commission studied the responses to the Questionnaire contained in the Consultation Paper, in relation to WPPs and then gave its recommendations:[48]

(i) WPPs are necessary in our country and may be limited to cases of 'serious' offences and must apply to victims and prosecution witnesses alike. They can be confined, to cases triable by Sessions Courts or Courts of equal rank and Special Courts where, witness protection outside the Court is felt necessary. Such a determination must be made in the Court of a Magistrate on an application by the investigation agency or the public prosecutor. It is obvious that WPPs require finances and unless the Central/State Governments come forward to meet the expenditure, the programmes cannot be introduced.

(ii) The concerned witness may be given a different identity, (say) he or she may be described by a letter in the English alphabet, and his or her address may be kept secret. If any statement is recorded from the witness, the name and address should not be disclosed except to the investigation agency, and to the Magistrate who hears the application for grant of the protection under the programme.

(iii) If the WPP offers no more than identity protection, such protection is not very expensive and no heavy allocation of funds is necessary. The difference between identity protection given under the programme and WIP is that first is intended for purposes outside Court in various situations whereas later deals with protection during investigation before Police and inquiry and trial in the Court. The witness moves in society under a different name or identity under the WPP.

(iv) The Magistrate while granting such identity protection under the programme, need not to give any notice to the accused. The Police may place the relevant material before the Magistrate or the Magistrate may record the statement of the witness – keeping his or her identity confidential and he may pass an order in that behalf and the new identity will apply in all transactions or proceedings outside Court also.

(v) It is only where the measures such as re-location, maintenance, providing accommodation, transport etc. are given, apart from identity protection, it will be effective but it then becomes necessary for the Union/State Governments to make adequate funds available under the programme.

(vi) There may indeed be a few grave cases where apart from giving identity protection, the other measures may be necessary.[49]

---

48 *Id.,* at p.161.

49 The measures indicated by the Commission are as follows:

(i) mention in the proceeding of an address different from one he uses or which does not coincide with the domicile location provided by the civil law;

(ii) being granted a transportation in a State vehicle for purposes of intervention in the procedural act;

[Footnote No. 49 Contd.]

(vii) The programme must contemplate other measures (as above), in addition to identity protection, to be taken wherever necessary even though such measures will be confined to extraordinary cases among the class of cases of serious offences triable by Courts of Session. It is, therefore, not possible to deny the benefit of other measures absolutely at least in deserving cases, however small in number they may be. So adequate funds must be allocated by the Union and State Governments to deal with above aspects.

(viii) In the WPP, the control ultimately must be with Judicial officers. The Police may decide which witness requires to be placed under the WPP but it must be for the Magistrate to decide whether a witness has to be admitted to the programme.

(ix) The Chief Justice of the State High Court must be the Patron-in-chief of the WPP and he may administer the fund through the State Legal Aid Authority, which is constituted for each High Court and which is headed by a High Court Judge. Whenever a Magistrate, upon an application by the District Superintendent of Police or Commissioner of Police or the Public Prosecutor, passes an order admitting a witness to the WPP, the order should be communicated to the State Legal Aid Authority and the latter should issue appropriate directions to the District Legal Services Authority, for release of funds for the purpose of implementing the order. Out of the amount allocated to the State Legal Aid Authority, a certain amount must, therefore, be set apart for funding the WPPs.

(x) The benefit of the programme could be extended to defence witnesses also because the basis of extending the programme to defence witnesses is that their life and property is in danger. But, as the question of funding the programme may have some constraints, for the present, the programme may be confined to prosecution witnesses and victims in the matter of crimes triable by a Court of Session.

(xi) The police must be satisfied that a victim or a witness's life is "likely" to be in serious danger.[50] But, this alone, without a further order of Court, is not

---

[Footnote No. 49 Contd.]

(iii) being granted a room, eventually put under surveillance and security located in the Court or the police premises;
(iv) benefiting from police protection extended to his relatives or other persons in close contact with him;
(v) benefiting from inmate regimen which allow him to remain isolated from others and to be transported in a separate vehicle;
(vi) delivery of documents officially issued;
(vii) changes in the physiognomy or the body of the beneficiary;
(viii) granting of a new place to live in the country or abroad, for a period to be determined;
(ix) free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;
(x) implementation of conditions for the obtaining of means of maintenance;
(xi) granting of a survival allowance for a specific period of time.

50 The Commission observed that such a decision must be taken by a senior Police Officer of the rank of Superintendent of Police/Commissioner of Police and he must, after recording his reasons for coming to such a conclusion, certify about his satisfaction.

sufficient.[51] Such a procedure before a Magistrate must take place in camera. In that inquiry, there is no need to hear the suspect or the accused. The Magistrate must also decide whether the witness should not merely be granted a different identity but whether, any other measures are required in the case like relocation, financial assistance etc. as stated earlier.

(xii) In several cases, it may not be sufficient to grant protection only to the witness. There may be threats to the spouse, children or parents, brother or sisters of the witness. Depending upon who is living close to the witness and who is likely to be threatened, an assessment of the extent of threat to each such family member, must, no doubt, be made and if there is danger, the protection will have to extended.[52]

(xiii) The expenditure for WPPs must be borne by the Central Government and State Governments equally, 50% each.[53]

(xiv) An MoU has to be entered by the victim/witnesses with the District Superintendent of Police or the Commissioner of Police, as the case may be, and they would move the Magistrate for admitting the victim/witness to the programme.[54] In case of breach of MoU by the victim/witness or the police or any other person, the affected party can move the Magistrate for appropriate orders.

(xv) A civil proceeding, if it has to be instituted by the protected victim/witness, as a plaintiff or a petitioner, then instead of making a provision for extending period of limitation, it will be sufficient if the protected person is enabled to file the case under a pseudonym, where his or her real name and address are not disclosed in the Court records but are disclosed only to the Judge. The same procedure can be adopted if a civil proceeding is pending at the time

---

51 The Commission observed that the police or the public prosecutor must then move the Court of the concerned Magistrate who may examine the certification and material on which the certificate is based and pass a judicial order.

52 It is common experience that a spouse or children of a witness are generally threatened with abduction. Further, if it is decided to relocate a witness or victim at a different place and he or she happens to be the breadwinner, the immediate family members of the witness may be deprived of all means of livelihood if the witness alone is relocated and in such cases, interests of justice certainly require that the immediate family members be also relocated. The 'close family members' may be confined to spouse, children, parents, grandparents, brothers and sisters, but relief may be limited to those whose life or property may be in danger.

53 The commission observed that IPC, 1860 is a piece of Central Legislation, which is being administered by the Courts established by the State Governments. So is the Cr.P.C., 1973. Further, in 1976, by constitutional amendment, the subject of 'Administration of Justice has been shifted in Schedule 7 of the Constitution from the State List to the Concurrent List under Entry 11A and by that, the Central and State Governments have assumed joint responsibility for the 'administration of justice'.

54 The commission commented that on such orders, funds will be released thereafter by the Legal Aid authorities as stated earlier. Various obligations of the parties, which have to be covered by the MoU can be listed. The MoU must provide that each party to the MoU will abide by the terms of the MoU. The MoU must contain the broad obligations such as those in WPPs in Canada and South Africa. As to enforcement of the provisions of the MoU, once the rights and obligations are set out in the statute, it can also provide, if necessary, that the parties to the MoU may approach the Magistrate Court for the purpose of enforcement of its terms.

when the witness is declared as a protected witness and has to be continued. The proceedings will reflect the pseudonym and the new address will be kept secret except to the Judge in the civil case. Thereafter the civil proceeding has to be stayed temporarily till the criminal case in which the person is a protected witness under the programme is completed.

(xvi) Where the protected person is sued in his real name, and is a defendant/respondent, the proceeding may again have to be stayed temporarily after substituting his name by a pseudonym and his new address has to be kept confidential except to the Judge in the civil case. The stay of the civil proceeding in both situations will be till the completion of the criminal case (in the trial Court) in respect of which he has been admitted to the WPP. Such stay orders have to be granted ex-parte and in in-camera proceedings in the Court in which the civil case is filed or is pending and they will have to be passed upon the application of the above said police authorities or the public prosecutor or the affected witness by using his pseudonym in that civil Court.

(xvii) The following procedure has to be adopted if a criminal case is filed by/against the protected witness:

a. Where a criminal case is filed against the victim/witness admitted to a WPP, his or her real identity and pseudonym/relocated address may be disclosed only to the Magistrate or Judge dealing with such proceeding, i.e. the proceeding filed against the protected witness and the said Magistrate or Judge will have to stay the criminal proceeding till the trial in the earlier proceeding in which the person so accused is a protected witness is completed.

b. Where the victim/witness is a complainant in a criminal case or a prosecution witness, the real identity and address will be disclosed to the Judge/Magistrate before whom the matter would come up and that proceeding has to be stayed till the trial of earlier proceeding in which the person is a protected witness is completed.

(xviii) The unauthorized disclosure by any person of the identity of a witness admitted to a WPP must be made an offence under the proposed law and must be made severely punishable.

(xix) If the protected witness violates the MoU and fails or refuses to testify without justifiable cause, both action for contempt of Court and cancellation of the order admitting the witness to the programme must follow.

(xx) If a victim/witness is given physical protection outside Court or is relocated and given a different name, that no way affects the rights of the accused in that case and he can have no grievance as long as the person will be brought before the Court to depose against him. However, if such victim/witness has, in addition, a WIP order, the accused has a right of appeal to the High Court.

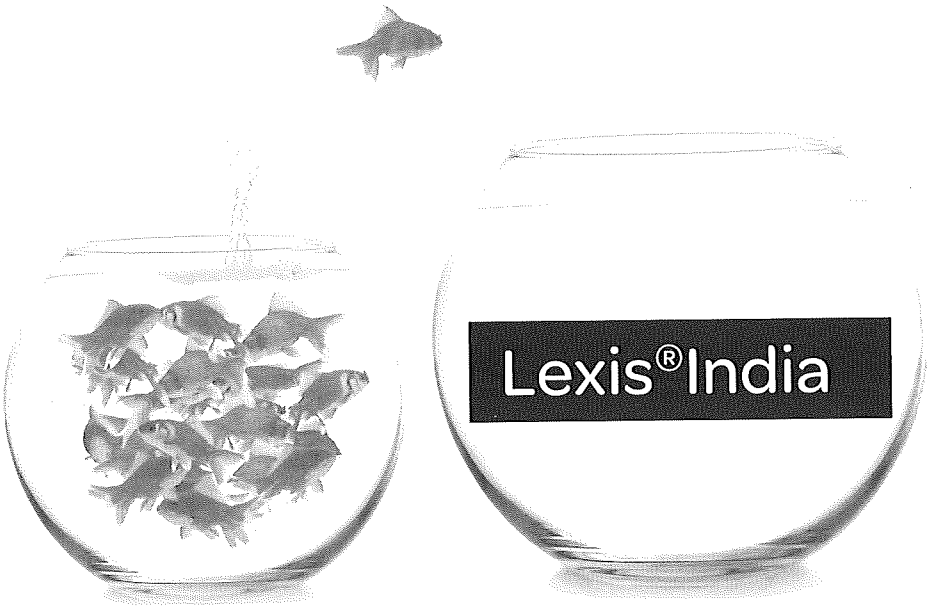
(xxi) However, if a Magistrate refuses to admit witness/victim to a WPP, the witness/victim must have a right of appeal to the High Court.

6.1 Conclusion

Thus although the Law Commission has dealt in detail with the procedure to deal with the issue of providing identity protection and anonymity to the witness and even suggested a draft bill for the same, however on the issue of WPP, to deal with the extreme cases of threat to witnesses, the Commission has just made some sketchy suggestions without coming out with solutions as to 'how to do it'. Important aspects like funding and sources thereof, the procedures involved in change of identity, various rights, duties of the participants/protected witnesses, the procedural aspects for admission into the program etc. need to have been dealt with exhaustive detail so as to help in establishment of such a programme. Further the suggestions made by the Commission in Part I and II of the Report are not comprehensive enough to deal with all dimensions relating to the concept of witness protection. Many countries in the world have enacted laws for witness protection, but there is no such law in India. So time has come for comprehensive law being enacted in our country also for protection of the witnesses and members of their families.

LexisNexis®

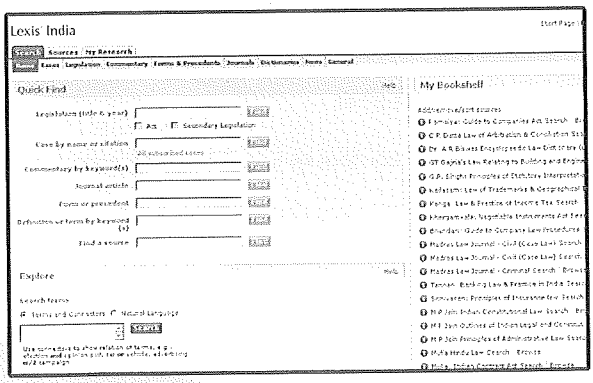
Take the Giant Leap Forward!



Experience a unique and innovative total legal research solution

Lexis®India... and stay ahead.

Anytime, anywhere online access to commentaries from your favorite authors like Mulla, Ramaiya, Sarkar, Ratanlal & Dhirajlal, R S Bachawat, M P Jain, Justice G P Singh, Kanga Palkhivala and many more with linkages to Central Acts and full text judgments from Supreme Court and High Courts.



Register for a free trial ID now, at:
www.lexisnexis.in/lexisindia

For demo, please visit us at:
http://www.youtube.com/lexisnexisindia

To know more, write to us at contact.in@lexisnexis.com with subject line '0713LILX'
or call our toll free nos.- Airtel: 1800-102-8177, BSNL: 1800-180-7126
or visit us at www.lexisnexis.co.in

LexisNexis®

Lexis®India

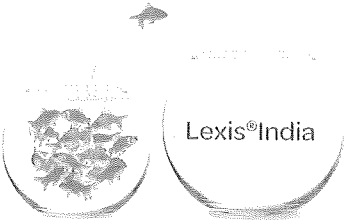
Legal Research on the *move*

Leap ahead with

Portable *Solutions* for Legal Research

What do you get in Lexis®India offline solution?

- Lifetime access* to the content you buy
- Supreme Court case laws with headnotes since inception
- Central Acts of India with full text of legislation
- Portability and convenience of usage even without internet
- Standard tablet features are available, viz. sharing of content by Email, Wi-fi, Bluetooth, etc.
- Search within search capability



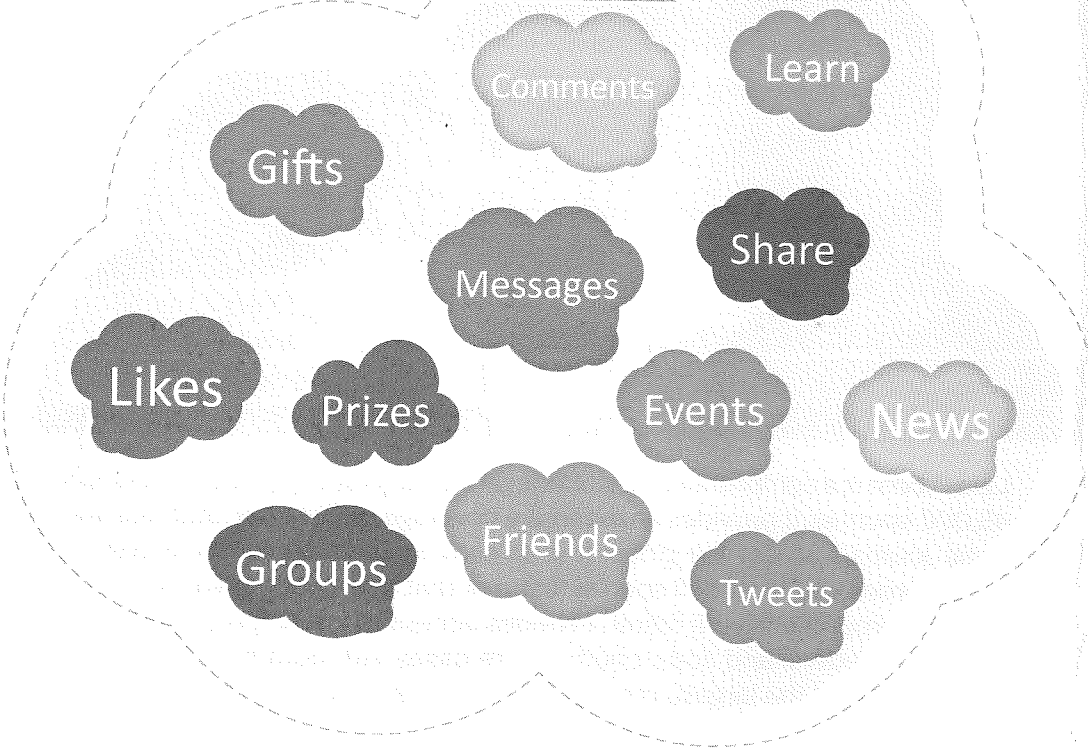
For more information, log on to www.lexisnexis.in/lexisindia

*Lifetime access means access to offline content even after the subscription period is over, but with no further offline updates

To know more, write to us at contact.in@lexisnexis.com with subject line '0713LILIT'
or call our toll free nos.- Airtel: 1800-102-8177, BSNL: 1800-180-7126
or visit us at www.lexisnexis.co.in

LexisNexis

Let's get Connected!



Join us on and and stay updated

Facebook
www.facebook.com/LexisNexisIndiaPage

or scan

Twitter
https://twitter.com/LexisNexisIndia

or scan

RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB
Sidhuwal, Bhadson Road, Patiala - 147 001 (Punjab)
Ph. No.: 0175-2050091, 2050092, 2050093
e-mail: info@rgnul.ac.in, **website** www.rgnul.ac.in